CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 142

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER,

vs.

PAUL W. SAMPSELL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES B. STRATTON, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

No. 10721

United States
Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Appellant,

vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy of the Estate of Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co.,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 55 Eleventh Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MATHES & SHEPPARD
GORDON F. HAMPTON

458 S. Spring St.
Los Angeles 13, Calif.

For Appellee:

MARTIN GENDEL and
NAT ROSIN

607 James Oviatt Bldg.
617 S. Olive St.
Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

In Bankruptcy

No. 39606-O'C

In the Matter of

CHARLES B. STRATTON, doing business under the fictitious firm names and styles of TEMPLE CITY BUILDING MATERIALS CO., and STRATTON CONSTRUCTION CO.,

Bankrupt.

INVOLUNTARY BANKRUPTCY PETITION AGAINST INDIVIDUAL

DEL MAR BUILDING SUPPLIES, a corporation, and

W. E. HOFFMAN, doing business under the fictitious firm name and style of Hoffman Building Materials, and

WALTER L. ZIEGLER, doing business under the fictitious firm name and style of ZIEGLER MANUFACTURING CO.,

Petitioning Creditors,

vs.

C. B. STRATTON, doing business under the fictitious firm names and styles of TEMPLE CITY BUILDING MATERIALS CO., and STRATTON CONSTRUCTION CO.,

Bankrupt.

To the Honorable J. F. T. O'Connor, Judge, United States District Court:

The petition of Del Mar Building Supplies, a corporation, W. E. Hoffman, doing business under the fictitious firm name and style of Hoffman Building Materials, and Walter L. Ziegler, doing business under the fictitious firm name and style of Ziegler Manufacturing Co., respectfully represents: [2]

I.

That petitioner, Del Mar Building Supplies, now is, and at all times herein mentioned was a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business situate in the District aforesaid. That petitioner, W. E. Hoffman, doing business under the fictitious firm name and style of Hoffman Building Materials, now is, and at all times herein mentioned was a resident of the City of El Monte, County of Los Angeles, State of California, and petitioner Walter L. Ziegler, doing business under the fictitious firm name and style of Ziegler Manufacturing Co., now is, and at all times herein mentioned was a resident of the City of Bellflower, County of Los Angeles, State of California.

II.

That C. B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co. and Stratton Construction Co., has, for the greater portion of the six (6) months next preceding the date of this petition, had

his principal place of business, and has resided in Temple City, County of Los Angeles, State of California, in the District aforesaid, and owes debts to the amount of One Thousand ($1,000.00) Dollars, and over; and is not a wage earner, nor a farmer, nor chiefly engaged in farming or the tillage of the soil.

III.

That your petitioners are creditors of said C. B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co., and have provable claims, which amount in the aggregate, in excess of securities held by them, to the sum of Five Hundred ($500.00) Dollars, and more.

IV.

The nature and amount of your petitioners' claims are [3] as follows:

The claim of Del Mar Building Supplies is for goods, wares, and merchandise, to-wit, building materials sold and delivered to said debtor at his special instance and request within two years last past, upon which there is now owing and unpaid the sum of Ninety-two and 65/100 ($92.65) Dollars;

The claim of W. E. Hoffman, doing business under the fictitious firm name and style of Hoffman Building Materials is for goods, wares, and merchandise, to-wit, building materials sold and delivered to said debtor at his special instance and request within two years last past, upon which there is now owing and unpaid the sum of Two Hundred Twenty-one and 67/100 ($221.67) Dollars;

The claim of Walter L. Ziegler, doing business under the fictitious firm name and style of Ziegler Manufacturing Co. is for goods, wares, and merchandise, to-wit, building materials sold and delivered to said debtor at his special instance and request within two years last past, upon which there is now owing and unpaid the sum of Three Hundred Thirty-four and 75/100 ($334.75) Dollars.

That all of the amounts hereinbefore mentioned remain still owing above all offsets and securities.

V.

Your petitioners further represent that said C. B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co. and Stratton Construction Co. now is insolvent, and that within the four (4) months next preceding the date of the filing of this Petition, the said C. B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co., committed an act of bankruptcy, in that on or about the 29th [4] day of October, 1941, he made a general assignment for the benefit of creditors to one, Charles R. Warfel.

Wherefore: Your petitioners pray that service of this Petition with a subpoena may be made upon the said C. B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co. and Stratton Construction Co. as provided in the Acts of Congress relating to bankruptcy, and that he may be adjudged by the

Court to be a bankrupt, within the purview of said acts.

DEL MAR BUILDING SUPPLIES

By E. B. HALE

President

W. E. HOFFMAN

W. E. Hoffman, doing business under the fictitious firm name and style of Hoffman Building Materials

WALTER L. ZIEGLER

Walter L. Ziegler, doing business under the fictitious firm name and style of Ziegler Manufacturing Co.

ROBERT R. ASHTON

Attorney for Petitioners. [5]

United States of America
Southern District of California,
Central Division—ss.

I, E. B. Hale, the duly authorized President of Del Mar Building Supplies, a corporation organized and existing under and by virtue of the laws of the State of California, do hereby make solemn oath that the statements on behalf of Del Mar Building Supplies, a corporation, contained in the foregoing petition subscribed by me, are true.

E. B. HALE

The President of the Del Mar Building Supplies, a corporation

Subscribed and sworn to before me, this 8 day of November, 1941.

CHAS. HAAS

Notary Public in and for said County and State.

My Commission Expires Nov. 19, 1941.

United States of America,
Southern District of California,
Central Division—ss.

I, W. E. Hoffman, do hereby make solemn oath that the statements on my behalf contained in the foregoing petition, subscribed by me, are true.

W. E. HOFFMAN

Owner

Subscribed and sworn to before me, this 8th day of Nov., 1941.

[Seal] ELDRED E. WOLFORD

Notary Public in and for said County and State.

United States of America,
Southern District of California,
Central Division—ss.

I, Walter L. Ziegler, do hereby make solemn oath that the statements on my behalf contained in the foregoing petition, subscribed by me, are true.

WALTER L. ZIEGLER

Owner

Subscribed and sworn to before me, this 8 day of Nov., 1941.

[Seal] KATHERINE MacRAE
Notary Public in and for said County and State

Com. exp. 9-16-45.

[Endorsed]: Filed Nov. 10, 1941. [6]

In the District Court of the United States, Southern District of California, Central Division

No. 39,606-O'C

In the Matter of

C. B. STRATTON, dba TEMPLE CITY BUILDING MATERIALS CO., and STRATTON CONSTRUCTION CO.,

Alleged Bankrupt.

PETITION FOR ORDER REFERRING PROCEEDINGS TO A REFEREE UNDER THE PROVISIONS OF SECTION 22a OF THE BANKRUPTCY ACT

To the Honorable J. F. T. O'Connor, Judge of the District Court of the United States, Southern District of California, Central Division:

The petitioning creditors in the above entitled alleged bankruptcy matter, through their attorney, Robert Ashton, respectfully represent to the court as follows:

I.

That an involuntary petition in bankruptcy has been filed against the above named alleged bankrupt.

II.

That the business of said bankrupt is that of building construction materials and supplies. That in the maintenance and operations of said business many problems have arisen which will require extensive examinations of the alleged bankrupt and numerous witnesses; that certain transfers of property have been made, assignments, etc., that will require further examinations under the provisions of Section 21-a of the Bankruptcy Act. It will likewise be necessary to bring certain proceedings to marshal the various assets of this estate. That your petitioners believe that the said matters can all be more expeditiously handled in the court of one of the referees of this court and your petitioners believe that under the provisions of Section 22-a of the Bankruptcy Act that the matter herein should be referred to one of the Referees of this court for further administration.

Wherefore, your petitioners pray that the proceedings herein [8] be referred generally to one of the referees of this court for such other and further administration of this estate as may be proper under

and pursuant to the provisions of Section 22-a of the Bankruptcy Act.

ROBERT ASHTON
Attorney for Petitioning Creditors.

(Duly verified by Robert Ashton.)

[Endorsed]: Filed Nov. 14, 1941. [9]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

Upon reading and filing the petition of the Petitioning Creditors, by and through their attorney, Robert Ashton, good cause appearing therefrom, and no adverse interests appearing thereat,

It Is Ordered that the above entitled matter be referred generally to the Honorable Ernest R. Utley as Referee for further administration under and pursuant to the provisions of Section 22a of the Bankruptcy Act.

Dated this 14 day of November, 1941.

J. F. T. O'CONNOR
U. S. District Judge

[Endorsed]: Filed Nov. 14, 1941. [12]

[Title of District Court and Cause.]

ORDER OF ADJUDICATION

Whereas, an involuntary petition in bankruptcy was heretofore filed in the above entitled Court in the above entitled matter, praying that Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Co., and Stratton Construction Co., be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, and an order of general reference having been made by the Judge of the above entitled court to the undersigned Referee, and it appearing that said Charles B. Stratton has filed a consent to the entry of the order of adjudication.

Now, Therefore, the said Charles B. Stratton is hereby declared and adjudged a bankrupt accordingly, and that the undersigned Referee in Bankruptcy take such further proceedings therein as are required by said Act.

Dated: November 27, 1941.

ERNEST R. UTLEY
Referee in Bankruptcy [14]

[Endorsed]: Filed Nov. 27, 1941. Ernest R. Utley, Referee, by [Illegible] Clerk.

[Endorsed]: Filed Nov. 28, 1941. R. S. Zimmerman, Clerk, by E. M. Enstrom, Jr., Deputy Clerk.

[15]

[Title of District Court and Cause.]

NUNC PRO TUNC ORDER CORRECTING DECREE

It appearing to the Court that the judgment herein entered by the Clerk in the above entitled action is not a correct memorandum of the judgment as rendered and announced by this Court, in that the judgment as rendered and announced related and had to do with the adjudication in bankruptcy of Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co., and

Whereas, through inadvertence and clerical error, the said judgment of adjudication in bankruptcy referred to said bankrupt as doing business under the fictitious firm names and styles of Temple City Building Co., and Stratton Construction Co., through the inadvertent omission of the word "Materials" therein and its omission in the Schedules and Summary of the Debts and Assets and Statement of Affairs of the bankrupt:

Now, Therefore, It Is Hereby Ordered that the judgment heretofore entered by this Court in the above entitled action on the 27th day of November, 1941, be, and the same is, hereby corrected to [16] conform to the actual judgment announced and rendered by the Court by the insertion in said judgment of the word "Materials" omitted as aforesaid, and

It Is Further Ordered that said mistake be cor-

rected throughout the files herein wherever said omission occurs, and

It Is Further Ordered that the order correcting the record of said judgment be entered nunc pro tunc to appear of record as of the 27th day of November, 1941, that being the date when said judgment was *original* made and entered.

Done in Open Court This 14 Day of April, 1942.

ERNEST R. UTLEY
Referee [17]

[Endorsed]: Filed Apr. 15, 1942. R. S. Zimmerman, Clerk, by E. J. Sears, Jr., Deputy Clerk.

[Endorsed]: Filed Apr. 14, 1942. Ernest R. Utley, Referee, by Louise Rodgers. [18]

District Court of the United States for the Southern District of California, Central Division.

Bankruptcy File No. 39,606-O'C

In the Matter of

CHARLES B. STRATTON, doing business as TEMPLE CITY BUILDING MATERIALS CO.,

and as

STRATTON CONSTRUCTION CO.,

Alleged Bankrupt.

SUBPENA TO ALLEGED BANKRUPT

To Charles B. Stratton, doing business as Temple City Building Materials Co., and as Stratton Construction Co., in said district:

A petition in bankruptcy having been filed on the 10th day of Noveniber, 1941, before the District Court of the United States within and for the So. District of California, as a court of bankruptcy, praying that you may be adjudged a bankrupt under the act of Congress relating to bankruptcy.

You are hereby summoned and required to appear and plead to said petition, on or before the 21st day of November, 1941; and if you fail to do so, you may be adjudged a bankrupt by default.

Witness the Honorable J. F. T. O'Connor, judge of said court, and the seal thereof, at Los Angeles, California, this 10th day of Nov., 1941.

[Seal] R. S. ZIMMERMAN,
Clerk.
By M. M. KARCHER,
Deputy Clerk. [19]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the day of 19 .. I received the within subpena

Returned unexecuted, November 28, 1941. No instructions received.

ROBERT E. CLARK,
O. S. MARSHALL
[Seal] FRED B. MANBURT,
Deputy U. S. Marshal.

[Endorsed]: Filed Dec. 4, 1941. R. S. Zimmerman, Clerk, by E. M. Enstrom, Jr., Deputy Clerk. [20]

SUMMARY OF DEBTS AND ASSETS

(From the Statements of the Debtor in Schedules A and B)

		Dollars	Cents
Schedule A....1—a	Wages	268	00
Schedule A....1—b (1)	Taxes due United States	Unknown	
Schedule A....1—b (2)	Taxes due States	"	
Schedule A....1—b (3)	Taxes due counties, districts and municipalities	"	
Schedule A....1—c (1)	Debts due any person, including the United States, having priority by laws of the United States	1,436	00
Schedule A....1—c (2)	Rent having priority	none	
Schedule A....2	Secured claims	4,742	00
Schedule A....3	Unsecured claims	52,439	01
Schedule A....4	Notes and bills which ought to be paid by other parties thereto	none	
Schedule A....5	Accommodation paper	"	
	Schedule A, total	58,885	01
Schedule B....1	Real estate	10,500	00
Schedule B....2—a	Cash on hand	93	39
Schedule B....2—b	Negotiable and non-negotiable instruments and securities	230	00
Schedule B....2—c	Stocks in trade	5,822	81
Schedule B....2—d	Household goods	1,050	00
Schedule B....2—e	Books, prints and pictures	25	00
Schedule B....2—f	Horses, cows and other animals	none	
Schedule B....2—g	Automobiles and other vehicles	25	00
Schedule B....2—h	Farming stock and implements	none	
Schedule B....2—i	Shipping and shares in vessels	none	
Schedule B....2—j	Machinery, fixtures, and tools	100	00
Schedule B....2—k	Patents, copyrights, and trademarks	none	
Schedule B....2—l	Other personal property	25	00
Schedule B....3—a	Debts due on open accounts	10,491	06
Schedule B....3—b	Policies of insurance	2,000	00
Schedule B....3—c	Unliquidated claims	none	

		Dollars Cents
Schedule B....3—d	Deposits of money in banks and elsewhere	93.39
Schedule B....4	Property in reversion, remainder, expectancy or trust	none
Schedule B....5	Property claimed as exempt....	3,375.00
Schedule B....6	Books, deeds and papers.....	none
	Schedule B, total	33,830.65

CHARLES B. STRATTON
Petitioner

[Endorsed]: Filed Dec. 23, 1941. R. S. Zimmerman, Clerk, by M. M. Karcher, Deputy Clerk. [21]

STATEMENT OF AFFAIRS

(Form No. 3)

(For Bankrupt or Debtor engaged in business)

(Instructions: Each question herein must be answered or the failure to answer explained. If the answer is "none," this should be stated. If additional space is needed for the answer to any question, a separate sheet properly indentified and made a part hereof, should be used and attached. If the Bankrupt or Debtor is a partnership or a corporation, the answers should be made on behalf of such partnership, or corporation, and the statement should be verified by a member of the partnership or a duly authorized officer of the corporation.)

To The Honorable J. F. T. O'Connor, Judge of the District Court of the United States for the Southern District of California, Central Division:

The Petition of Charles Barto Stratton of 2805 Matero, City of Pasadena in the County of *County* Southern District of the State of California, and by occupation a general building contractor.

Respectfully Represents:

1. That the Petitioner ~~is now~~ (or was until the 28th day of November, 1941) engaged in the business of general contracting under the name of Stratton Construction Co., and Temple City Building Co. at the address 119 North Oak, Temple City, California.

That the Petitioner commenced such business on or about the date 1935.

That during the six years immediately preceding the filing of the original Petition herein, the Petitioner was engaged in the businesses, at the addresses and with the partners, joint adventurers or other associates, as follows:

From (date):
1935
Jan. 1939

To (date):
Nov. 10, 1941
Nov. 10, 1941

Nature of Business:
Contracting Business,
Building Materials,
Operation of Courts

Address of Business:
119 N. Oak, Temple City
119 N. Oak, Temple City
119 N. Oak, Temple City

Names of Partners or Associates:
None
"
"

2. That during the two years immediately preceding the filing of the original Petition herein, the books of account and records of the Petitioner have been kept by or under the supervision of:

From (date):
1940

To (date):
1941

Name of Bookkeeper:
Mrs. Lannie Armstrong

Address of Bookkeeper:
212 N. Cloverly, Temple City

That during the two years immediately preceding the filing of the original Petition herein, the books of account and records of the Petitioner has been audited by:

No Audit [22]

That the books of account and records of the Petitioner are now in the possession of A. S. Menick, Receiver in Bankruptcy, at the office of his attorney, George Goggin, at the address Room 817, H. W. Hellman Bldg. Los Angeles, Calif.

3. That the dates, and the names and addresses of the persons to whom the Petitioner has issued financial statements, (including those to mercantile and trade agencies) upon his business and property within the two years immediately preceding the filing of the original Petition herein, are as follows:

Date:
Jan. & July

Name of Concern:
Temple City National Bank

Nature of Business:
Temple City Building Materials, and Stratton Construction

Address:
119 N. Oak, Temple City
same

4. That the last inventory of the Petitioner's property was taken on the day of 19 by (or under the supervision of) Charles R. Warfel, address 617 S. Olive: and the said inventory was taken at market value: and the amount of said inventory was $5,822.81.

That the next prior inventory to the last inventory taken of Petitioner's property was taken on the (no previous inventories taken).

5. That the dates, sources, particulars and amounts of income received by the Petitioner during each of the two years immediately preceding the filing of the original Petition herein, other than from the operation of Petitioner's business, are as follows:

Date:

None

6. That the last filing of a U. S. Federal Income Tax Return by the Petitioner was for the year 1940 and was filed by the Petitioner at the office of U. S. Collector of Internal Revenue at Los Angeles, California.

That the last filing of a State Income Tax Return by the Petitioner was for the year 1940 and was filed by the Petitioner at the office of Franchise Tax Commissioner Income Tax Div. of the State of California at Sacramento, California.

7. That within the two years immeditely preceding the filing of the original Petition herein, the Petitioner maintained bank accounts, alone or together with any other person, and in Petitioner's own name or any other name, as follows:

Name and Address of Bank:

Temple City National Bank

Temple City National Bank

Account in Name of:

Stratton Construction Co.

Temple City Building Materials,

Names of Persons authorized to make withdrawals:

C. B. Stratton

C. B. Stratton [23]

That within the two years immediately preceding the filing of the original Petition herein, the Petitioner maintained safe deposit boxes or other depositories for Petitioner's securities, cash, or other valuables, as follows:

(Note: Give the name and address of each bank, or other depository, the name in which each box or other depository was kept, the name of every person who had the right of access thereto, a brief description of the contents thereof, and if surrendered, when surrendered, or if transferred, when transferred and the name and address of the transferee.)

Safe Deposit Box at Temple City National Bank. The only persons having access to said box were myself and my secretary and bookkeeper, Mrs. Lannie Armstrong.

8. That the only property or properties held in trust by Petitioner for any other person are as follows:

(Note: Give name and address of such person or persons and a description of the property and the amount or value thereof:

None

9. That within the six years immediate preceding the filing of the original Petition herein, proceedings under the Bankruptcy Act have been brought by or against the Petitioner as follows:
(Note: Give the location of the Bankruptcy Court, the nature of the proceeding, and whether a discharge was granted or refused, or a composition arrangement or plan was or was not confirmed.)

No prior bankruptcy proceedings ever had.

That at the time of the filing of the original Petition herein, certain property of the Petitioner was in the hands of a receiver or trustee, as follows:
(Note: If so, give the name and location of the Court, the nature of the proceeding, a brief description of the property, and the name of the receiver or trustee.)

Shortly prior to the filing of the petition herein, the bankrupt had turned over his property to Brunke & Silver, and Charles R. Warfel, as Trustees for the benefit of creditors. It is petitioner's understanding that all that property was turned over to the Receiver in Bankruptcy herein.

That within the two years immediately preceding the filing of the original Petition herein, the Petitioner made assignments of Petitioner's property for the benefit of creditors or general settlement with Petitioner's creditors, as follows:
(Note: If so, give dates, the name of the assignee or assignees, and a brief description of the terms of assignment or settlement.)

As above stated. [24]

10. That during the year immediately preceding the filing of the original Petition herein, the Petitioner made repayments of loans, as follows:

(Note: Give the name and address of the lender, the amount of the loan and when received, the amount and date when repaid, and, if the lender is a relative, the relationship. If the Bankrupt or Debtor is a partnership, state whether the lender is or was a partner or a relative of a partner, and if so, the relationship.)

11. During the year immediately preceding the filing of the original Petition herein, the Petitioner transferred or disposed of, other than in the ordinary course of business, the following assets or properties:

(Note: Give a description of the properties, the date of the transfer or disposition, to whom transferred or how disposed of and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)

Pursuant to the property settlement entered into between Sadie A. Stratton and Charles B. Stratton, this petitioner transferred to said Sadie A. Stratton, his wife, the following described properties:

1. Property known as 319 South Acacia Street, San Gabriel, Calif., together with household furniture and furnishings therein located;
2. Two lots on Las Tunas Blvd. west of Oak,

Temple City, improved with a three-unit bungalow court.

Previous to these transfers all of the property in which Petitioner had an interest was held in joint tenancy with Sadie A. Stratton, and in consummation of the Property Settlement mutual releases were made to the other of those joint tenancy interests so that specific property vested in Petitioner and Sadie A. Stratton as their separate property.

12. That during the year immediately preceding the filing of the original Petition herein, the Petitioner assigned accounts receivable as follows:

Date of Assignment:
March, 1940

Name of Assignee:
Bank of America

Address of Assignee:
Ventura, California

The consideration for the above assignment was the payment in advance upon a job, to-wit: Ventura Bowling Alley, then being constructed in Ventura by Petitioner, and the assignment was for money due or to become due on that job.

13. That during the year immediately preceding the filing of the original Petition herein, the Petitioner suffered losses from fire, theft or gambling as follows:

No losses through fire, theft of gambling. [25]

(If the Bankrupt or Debtor is a partnership or corporation the following additional questions should be answered.)

14. That during the year immediately preceding the filing of the original Petition herein, personal withdrawals, including loans, have been made by each member of the partnership, or by each officer, director or managing executive of the corporation, as follows:

Not a partnership, or a corporation.

15. (If the Bankrupt or Debtor is a Partnership) The names and addresses of the members of the partnership, comprising the Petitioner, are as follows:

Not a partnership

(If the Bankrupt or Debtor is a Corporation) The names, titles or offices held, and addresses of the officers, directors and managing executive and of each stockholder holding twenty-five (25%) percent of the issued and outstanding stock of the corporation petitioner, are as follows:

Not a corporation.

CHARLES B. STRATTON
C. B. Stratton
Bankrupt or Debtor

COURTNEY A. TEEL
Attorney for Petitioner [26]

OATH TO STATEMENT OF AFFAIRS

State of California,
County of Los Angeles—ss.

I, Charles B. Stratton, also known as Charles Barto Stratton, the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

CHARLES B. STRATTON
C. B. Stratton
Bankrupt or Debtor

Subscribed and sworn to before me this 17th day of December, 1941.

KATHLEEN M. P'KER
Notary Public in and for said County and State.

[27]

[Endorsed]: Filed Dec. 23, 1941. R. S. Zimmerman, Clerk, by M. M. Karcher, Deputy Clerk. [28]

[Title of District Court and Cause.]

DISCHARGE OF BANKRUPT

At Los Angeles, in said District, on the 3rd day of March, 1942.

It appearing that Charles B. Stratton, etc. of Temple City, in the County of Los Angeles, State of California, was duly adjudged a Bankrupt on a petition filed against him on the 10th day of November, 1941; and

It further appearing that, after due notice by

mail, no objection to the discharge of said Bankrupt was filed within the time fixed by the Court (or objections to the discharge of the said Bankrupt were filed and, after due notice by mail, were heard and were not sustained);

It is ordered that the said Charles B. Stratton, etc. be, and he hereby is, discharged from all debts and claims which are made provable by said Act against his estate, except such debts as are, by said Act, excepted from the operation of a discharge in Bankruptcy.

ERNEST R. UTLEY,
Referee in Bankruptcy.

CERTIFICATE OF TRUE COPY

United States of America,
Southern District of California,
Central Division—ss.

I, Ernest R. Utley, Referee in Bankruptcy in and for the County of Los Angeles, State of California, in and for the said district, do hereby certify that the foregoing is a true and correct copy of Discharge of Bankrupt in the above entitled matter as the same appears of record in the proceedings in said matter now on file in my office.

In Witness Whereof, I have hereunto set my hand this 3rd day of March, 1942.

ERNEST R. UTLEY,
Referee in Bankruptcy. [29]

[Endorsed]: Filed March 5, 1942. R. S. Zimmerman, Clerk, by M. M. Karcher, Deputy Clerk. [30]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Hon. J. F. T. O'Connor, Judge of the United States District Court, Southern District of California, Central Division:

I, Ernest R. Utley, Referee in Bankruptcy, to whom the above entitled matter has been referred, do hereby certify as follows:

That on the 15th day of June, 1943, after hearing of an order to show cause issued upon the verified petition of Paul W. Sampsell, Trustee, Findings of Fact, Conclusions of Law and an Order was made by the Referee herein, which said Order granted the prayer of the Trustee and he was directed not to pay any dividend on the theretofore allowed general claim of the American Surety Company of New York in the sum of $6,987.48 unless and until the claims of three general creditors, to wit, Jack Campbell in the sum of $805.10, Probert Manufacturing Company in the sum of $385.00 and Tony Stevens in the sum of $146.01, had been paid in full and that the amount of the dividend otherwise payable on the claim of the American Surety Company of New York would be divided pro rata amongst the named three creditors, in the event that there was not a dividend in full, in addition to their ordinary dividend until their claims were paid in full or the dividends otherwise payable to the American Surety Company of New York, had been exhausted; that after the said three creditors were paid in full then the balance remaining of

the dividend otherwise payable to the American Surety Company of New York, if any, would be payable to said Surety Company. That thereafter and on the 25th day of June, 1943, the respondent American Surety Company of New York filed a petition for review [31] of the said Order.

Pursuant to Section 39, Subdivision 8, the Referee transmits to the Clerk the within certificate.

A short summary of the testimony as revealed by the evidence is as follows:

In 1941 the bankrupt, acting as a building contractor, obtained from the American Surety Company as surety a Laborers & Materialmen, Statutory Form of Bond for the State of California; this bond was used in connection with a construction for the General Electric Company in Ontario, California; the bond was in the amount of $33,950.00 and the company bound itself to pay in full or to be caused to be paid in full the claims of all persons performing labor upon or furnishing materials to be used in doing the work required by the General Electric job. The bankrupt did not make all of the payments to laborers and materialmen as required prior to bankruptcy and the bonding company paid out $6,724.78 to five unpaid claimants and incurred allowable expenses chargeable under the bond in the sum of $262.70 making a total allowable claim which they subsequently filed in bankruptcy in the within proceedings in the sum of $6,987.48. However, the three creditors named herein above in the amounts as specified along with several other creditors failed to file a Mechanics

Lien or to commence a suit against the American Surety Company within the time allowed by law or pursuant to the terms of the bond. The three named creditors diligently filed allowable proofs of claim in the amounts specified above in the within bankruptcy proceedings and their claims were so allowed.

An objection to the entire claim the American Surety Company was heard before the undersigned Referee and the objection was disallowed and the claim was allowed as a general claim. Subsequently, it came to the attention of the Trustee that the three named cerditors set forth herein above were among the class of creditors for whom the bond, also described above, had been written and that their claims had not been paid. The Trustee filed a petition requesting the American Surety Company to show cause why the order now being appealed from should not be made and after a [32] stipulation as to the facts and considerable argument along with the presentation of memoranda of authority the matter was submitted to your Referee, for ruling.

The American Surety Company took the position that as long as the three named creditors had not perfected their lien or suit rights as against the American Surety Company outside of the bankruptcy proceedings that this Court had no right to allow by indirection what the three claimants could not have accomplished by direction. This argument obviously carries considerable weight but on the other hand examination of the legal authorities

indicates that the Supreme Court of the United States has taken a contrary position and that this has been sustained by recent cases that have followed the Supreme Court ruling. The authorities which your Referee has reference to appeared to conclusively hold that if there remain in the bankruptcy proceedings any allowable claims by creditors of the class for whose benefit the original surety bond was written then the Surety Company cannot participate in dividends from the estate until these creditors have been paid in full. Otherwise, the result would be to permit a Surety Company to participate in a liquidation of the assets of its principal before the obligees whom it has undertaken to protect have received their money in full. It appears to your Referee that although the three named creditors herein above did not take the burden of presenting the petition for the order to show cause that, nevertheless, it is the duty of the Trustee to present such matters to the Referee and upon ascertaining the true facts it would be the duty of the Referee to enforce the law applicable to the division or payment of any dividends from a bankrupt estate.

Attached to this certificate are the following documents:

1—Findings of Fact, Conclusions of Law and Order.

2—Petition for Review of Referee's Order by Judge.

3—Petition of Trustee for Order to Show Cause

directed to American Surety Company of New York.

4—Order to Show Cause re: American Surety Company of New York.

5—Claim of American Surety Company of New York [33]

6—Claim of Jack Campbell.

7—Claim of Probert Manufacturing Company.

8—Claim of Tony Stevens.

9—Stipulation as to certain facts re: Order to Show Cause re: American Surety Company of New York.

Dated: July 21, 1943.

Respectfully submitted.

ERNEST R. UTLEY,
Referee in Bankruptcy.

[Endorsed]: Filed July 26, 1943. [34]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE AMERICAN SURETY CO.

Pursuant to the verified petition of Paul W. Sampsell, Trustee in Bankruptcy in the within estate, an Order to Show Cause was issued directed to the American Surety Co. of New York, dated February 19, 1943, and pursuant to the Petition and Order to Show Cause a hearing was duly held thereon upon the 18th day of March, 1943, at the

hour of 10:00 A.M. before the undersigned Referee in Bankruptcy; that said Paul W. Sampsell was represented in court by Martin Gendel, Esq., his attorney, and the respondent American Surety Co. of New York was represented in court by Gordon F. Hampton, Esq. of the firm of Mathes & Sheppard, Esq.; evidence having been duly introduced and the matter having been duly argued and submitted, the undersigned Referee makes the following

FINDINGS OF FACT [35]

I.

That on or about January 3, 1941, Charles B. Stratton, bankrupt herein, doing business as Stratton Construction Company, applied to the American Surety Co., for a contract bond in connection with his contract with the General Electric Co. calling for him to make certain alterations in a factory building at Ontario, California, and the American Surety Co.; as surety and said C. B. Stratton as principal, executed Bond No. 582303-K, under a form designated as "Laborers & Materialmen, Statutory Form For California", a true copy of said bond being attached hereto, marked Exhibit A, and incorporated herein by reference as though set forth verbatim.

II.

That thereafter and on or about January 7, 1941, the plans and specifications for said alterations in said factory building, an executed copy of the construction contract dated January 2, 1941, between

C. B. Stratton, doing business as Stratton Construction Company, and the General Electric Company, and the original of said Bond No. 582303-K were filed and recorded in the office of the County Recorder of San Bernardino County, California, the county wherein said factory is located.

III.

That pursuant to said construction contract, C. B. Stratton, as original contractor, set about to effect said alterations in said factory building; that a notice of completion with respect to said alterations was filed and recorded in the office of said County Recorder on or about September 10, 1941, and that the time for laborers and materialmen to file and record claims of lien in connection therewith expired on or about October 10, 1941.

IV.

That within the time limited by law, the following laborers and materialmen furnishing work and supplying materials [36] to C. B. Stratton, as said original contractor, each filed and recorded claims of lien and lodged written notices with the American Surety Company, as surety, pursuant to the provisions of Section 1183 of the California Code of Civil Procedure; Soule Steel Company, Emil Brown & Company, Harold Shugat Company, Valley Window Cleaners, and Shattuck Lumber Company. That thereafter and on the dates specified in the claim herein of the American Surety Company, the American Surety Company, as surety, paid in full

each claim of the laborers and materialmen specified in this paragraph in the following amounts:

Soule Steel Company	$4,767.09
Emil Brown & Company	1,498.42
Harold Shugat ompany	265.78
Valley Window Cleaners	126.85
Shattuck Lumber Company	66.64
	$6,724.78

V.

That Jack Campbell, Probert Manufacturing Company, and Tony Stevens are laborers and materialmen furnishing work and supplying materials to C. B. Stratton as said original contractor; that none of the parties specified in this paragraph ever filed or recorded a claim of lien in connection with said alterations, nor did any of them ever give any notice, either written or oral to the American Surety Company; nor did either of them ever make any demand, either written or oral, upon the American Surety Company; nor did any of them ever communicate with the American Surety Company in any way; nor did any of them ever commence any suit or action against the American Surety Company.

That with respect to the furnishing and supplying of said work and materials specified in this paragraph, said parties have filed claims herein against the estate of the above named bankrupt as follows: [37]

Jack Campbell	$ 805.10
Probert Manufacturing Co.	385.00
Tony Stevens (Total claim filed $445.45)	146.01
	$1,336.11

That in addition to the above named parties who remain unpaid as specified, there are two other laborers and materialmen in connection with said alterations who remain unpaid in the sum of $259.13; that no claim has been filed herein for said sum of $259.13, or any part thereof.

VI.

That there are numerous other general unsecured claims against the Estate of the above named bankrupt, other than the three claimants named in the preceding paragraph.

VII.

That The American Surety Company filed a general claim in the within estate in the sum of $6,987.48, which claim arose because of moneys expended by it as surety for the bankrupt on said bond; that said claim of The American Surety Co. of New York, after objection thereto, was allowed in court as a general claim in the sum of $6,987.48 arising from payments and expenditures in connection therewith under said bond.

VIII.

That the aforesaid three claims of Jack Campbell, Probert Manufacturing Company and Tony

Stevens, are general claims; that as against the American Surety Company, personally, it would appear that they have no cause of action which they could bring under law; that the class of creditors for whose protection the above referred to bond was written, includes the within three named unpaid creditors.

The undersigned Referee makes the following

[38]

CONCLUSIONS OF LAW

I.

That unless all of the creditors of the class protected by the bond above described were paid in full, the American Surety Company would not be entitled to receive a dividend upon its general claim, even though the said Surety Company had paid the moneys for which it was legally obligated to those creditors who had diligently filed their claims against the said Surety Company; that the claims of Jack Campbell in the sum of $805.10, Probert Manufacturing Company in the sum of $385.00 and Tony Stevens in the sum of $146.01, totalling the amount of $1336.11, were filed in the within bankruptcy proceedings within the time allowed by law and that said claims were allowed by this court.

II.

That to allow the Surety Company, by its indemnity contract, assignment or subrogation to receive consideration on its claim prior to the payment in full of the provable claims of the class or

creditors for whose protection the bond was originally written would be contrary to law and would defeat the purposes for which the bond was originally required, to wit, the protection of unpaid laborers and materialmen.

The undersigned Referee makes the following

ORDER

I.

The prayer of the Petition for the Order to Show Cause on behalf of the Trustee is hereby granted, and said Trustee, Paul W. Sampsell, Esq., is directed not to pay any dividend on the general claim of American Surety Company of New York in the sum of $6987.48 unless and until the claims of Jack Campbell, in the sum of $805.10, Probert Manufacturing Company in the sum of $385.00 and Tony Stevens in the sum of $146.01 have been paid in full, and such amount of the dividend otherwise payable on the claim of the [39] American Surety Co. of New York as may be required when divided pro rata amongst the named three creditors, shall be applied on their claims, in addition to their ordinary dividend until their claims have been paid in full or the dividends otherwise payable to the American Surety Co. of New York, have been exhausted; after the said three creditors have been paid in full, then the balance remaining of the dividend otherwise payable to the American Surety Company of New York, if any, shall be paid to said surety company.

Dated this 15th day of June, 1943.

ERNEST R. UTLEY

Referee in Bankruptcy

Approved as to form:

MATHES & SHEPPARD,

By GORDON F. HAMPTON [40]

EXHIBIT A.

Know All Men By These Presents: That We, C. B. Stratton, doing business as the Stratton Construction Company as principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact business under the laws of the State of California, as Surety, are held and firmly bound unto any and all persons, furnishing materials used in, upon, for or about the performance of the work contracted to be executed or performed under the contract hereinafter mentioned, and all persons who preformed work or labor upon the same, and all persons who supply both work and materials, and whose claim has not been paid by the contractor, company, or corporation, in the just and full sum of Thirty-Three Thousand Nine Hundred Fifty and No/100 ($33,950.00) Dollars, for the payment whereof well and truly to be made, said Principal and Surety bind themselves, their heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

"The Condition of the Foregoing Obligation Is Such, That Whereas the above bounden Principal

has entered into a contract, dated January 2, 1941, with General Electric Company to do and perform the following work, to wit: doing all alterations to factory building for the General Electric Company, Ontario, California.

Now Therefore, if the above bounden Principal shall pay or cause to be paid in full the claims of all persons performing labor upon or furnishing materials to be used in doing the work described in said contract or in any modification thereof, then this obligation shall be void; otherwise to remain in full force and effect. This bond shall inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in [41] said work, giving to such persons a right of action to recover hereon in any suit brought to foreclose mechanics liens arising under said contract or in a separate suit brought upon this bond in an amount not exceeding, however, in the aggregate of all recoveries, the amount of the bond as above specified.

No suit or action on this bond to recover for labor performed or material furnished in respect to to work herein referred to shall be sustained unless the same be commenced within the period provided by law after the claimant filed his claim of lien, or if he files no such claim of lien, unless the suit or action be commenced within six months after the contractor finally ceases operations on the work described in said contract.

Signed and Sealed this 3rd day of January, A.D., 1941.

Witness

AMERICAN SURETY COMPANY OF NEW YORK

By A. I. ZIMMERMAN
Resident Vice-President

Attest: LUCILE M. CHESLEY,
Resident Assistant Secretary

Received copy at 1:55 o'clock P.M. on the 9 day of June, 1943,

MATHES & SHEPPARD

By O. M. R.
Attorneys at Law

Filed Jun 15, 1943 at ..... min. past 10 o'clock A.M. Ernest R. Utley, Referee, Louise Rodgers, Clerk.

[Endorsed]: Filed Jul 26, 1943. Edmund L. Smith, Clerk. By E. M. Enstrom, Jr., Deputy. [42]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER BY JUDGE

To Ernest R. Utley, Esquire, Referee in Bankruptcy:

The petition of the American Surety Company of New York, a corporation, respectfully represents:

1. Your petitioner is a creditor of the above named bankrupt and petitioner's claim has been allowed in the total sum of $6,987.48.

2. Paul W. Sampsell, as the trustee in bankruptcy of the above named bankrupt, filed his petition herein for an order to show cause re American Surety Company and an order to show cause was issued thereon on February 19, 1943; said petition and order to show cause came on for hearing on March 18, 1943, and thereupon an order was entered on June 15, 1943, granting the prayer of said petition in the words and figures following: [43]

"ORDER

I.

The prayer of the Petition for the Order to Show Cause on behalf of the Trustee is hereby granted, and said Trustee, Paul W. Sampsell, Esq., is directed not to pay any dividend on the general claim of American Surety Company of New York in the sum of $6987.48 unless and until the claims of Jack Campbell, in the sum of $805.10, Probert Manufacturing Company in the sum of $385.00 and Tony Stevens in the sum of $146.01 have been paid in full, and such amount of the dividend otherwise payable on the claim of the American Surety Co. of New York as may be required when divided pro rata amongst the named three creditors, shall be applied on their claims, in addition to their ordinary dividend until their claims have been paid in full or the dividends otherwise payable to the American Surety Co. of New York, have been ex-

hausted; after the said three creditors have been paid in full, then the balance remaining of the dividend otherwise payable to the American Surety Company of New York, if any, shall be paid to said surety company.

Dated this 15th day of June, 1943.

ERNEST R. UTLEY
Referee in Bankruptcy

The said order is erroneous for the following reasons:

(a) Said order is erroneous in that it deprives the American Surety Company of New York of its pro rata dividend to which it is entitled as a surety who has paid in full and made whole all creditors to whom it at any time became obligated as surety or othewise. [44]

(b) Said order is erroneous in that it orders that any dividend payable to the American Surety Company on its allowed general claim shall be first applied to the general claims of Jack Campbell, Probert Manufacturing Company, and Tony Stevens until such claims have been paid in full.

(c) Said order is erroneous in that it orders the dividend payable on the claim of the American Surety Company of New York to be limited to a sum less than a dividend "of an equal per centum" on an allowed claim in contravention of Section 65(a) of the Bankruptcy Act.

(d) Said order is erroneous in that it orders the dividends payable on each of the claims of Jack Campbell, Probert Manufacturing Company, and

Tony Stevens to be enlarged to sums greater than the "equal per centum" to be paid on other general claims, and thus said order contravenes the provisions of Section 65(a) of the Bankruptcy Act.

(e) Said order is erroneous in that it orders that the American Surety Company of New York be deprived of its pro rata dividend, and thereby said order deprives the American Surety Company of New York of property without due process of law in contravention of the provisions of the Fifth Amendment to the Constitution of the United States of America.

(f) Said order is erroneous in that it deprives the American Surety Company of New York of its contractual right to indemnity from the estate of said bankrupt by reason of the express contract of indemnity between the bankrupt and said company, and thereby said order deprives the American Surety Company of New York of property without [45] due process of law in contravention of the provisions of the Fifth Amendment to the Constitution of the United States of America.

(g) Said order is erroneous in that it deprives the American Surety Company of New York, as a general creditor, of its pro rata dividend from the general assets of the bankrupt's estate and grants to Jack Campbell, Probert Manufacturing Company, and Tony Stevens, as general creditors, all or part of the pro rata dividend belonging to the American Surety Company of New York.

(h) Said order is erroneous in that it orders seizure in bankruptcy of all or part of the pro

rata dividend properly payable from the general assets of the bankrupt's estate on the allowed claim of the American Surety Company of New York; further in that it orders such dividend sum to be paid to Jack Campbell, Probert Manufacturing Company, and Tony Stevens in addition to the pro rata dividends going to said parties as general creditors; and further in that it orders such seizure without regard for the fact that at no time did any of said parties have any cause of action against the American Surety Company of New York as surety or otherwise.

(i) Said order is erroneous in that it disregards the rule that a surety is entitled to indemnity, reimbursement, and subrogation from the estate of its bankrupt principal when such surety has paid in full and made whole all creditors to whom it is obligated as surety.

(j) Said order is erroneous in that, on behalf of three general creditors, it orders summary execution upon the pro rata dividend payable to the American Surety Company [46] of New York as another general creditor and as against whom said three general creditors have no cause of action at law or in equity or otherwise.

(k) Said order is erroneous in that it disregards the provisions of Bond No. 582303-K referred to in paragraph I of the findings of fact herein and thus accomplishes by indirection in bankruptcy that which could not be accomplished directly by any suit brought on said bond by Jack Campbell, Probert Manufacturing Company, or Tony Stevens.

(l) Said order is erroneous in that it disregards the provisions of Section 1183 of the Code of Civil Procedure of the State of California under which the American Surety Company of New York filed Bond No. 582303-K and thus accomplishes by indirection in bankruptcy that which could not be accomplished directly by any suit brought on said bond by Jack Campbell, Probert Manufacturing Company, or Tony Stevens.

(m) Said order is erroneous in that it amounts to the making of a new surety contract and subjecting the American Surety Company of New York to retroactive liability thereunder.

(n) Said order is erroneous in that it orders the creation of causes of action and places summary execution in the hands of three non-diligent general creditors of the bankrupt against another general creditor of the bankrupt and thus by said order a court of equity aids the non-diligent contrary to equitable principles.

(o) Said order is erroneous in that it purports to determine in bankruptcy a collateral dispute among certain general creditors of the bankrupt.

[47]

(p) Said order is erroneous in that Paul W. Sampsell, as Trustee, is not the real party in interest thereunder and had no standing to petition for said order for the reason that the real parties in interest under said petition and said order are Jack Campbell, Probert Manufacturing Company, and Tony Stevens, as general creditors herein.

Wherefore, your petitioner prays for a review of said order by the judge, and that said order be vacated and set aside.

Dated June 23, 1943.

MATHES & SHEPPARD
and
GORDON F. HAMPTON
Attorneys for Petitioner [48]

United States of America
Southern District of California
Central Division—ss.

A. E. Krull being by me first duly sworn, deposes and says: that he is the Resident Vice President of the Los Angeles Office of the American Surety Company of New York, a corporation, the petitioner in the above entitled cause; that he has read the foregoing Petition for Review of Referee's Order by Judge and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true; that affiant makes this verification for and on behalf of the petitioner for the reason that the petitioner is a corporation and affiant is an officer thereof, to-wit, Resident Vice President, and has knowledge of the facts and is thereunto duly authorized.

A. E. KRULL

Subscribed and sworn to before me this 25 day of June, 1943.

[Seal] IVY TAYLOR

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Aug. 12, 1946. [49]

Received copy of the within petition this 25 day of June, 1943.

MARTIN GENDEL &
NAT ROSIN
By MARTIN GENDEL
Attorney for Trustee

Filed Jun 25, 1943 at ..... min. past 11 o'clock A.M. Ernest R. Utley, Referee. Louise Rodgers, Clerk.

[Endorsed]: Filed Jul. 26, 1943. Edmund L. Smith, Clerk. By E. M. Enstrom, Jr., Deputy. [50]

[Title of District Court and Cause.]

PETITION OF TRUSTEE FOR ORDER TO SHOW CAUSE, re AMERICAN SURETY CO.

To: Honorable Ernest R. Utley, Referee in Bankruptcy:

Comes now your petitioner, Paul W. Sampsell, as Trustee for the above named bankrupt, and respectfully represents as follows:

I.

That he is the duly elected, qualified and acting Trustee in the within estate.

II.

That heretofore the American Surety Co. of New York, a corporation, did file a claim in the within proceedings in the sum of $6,987.48; that said claim arose from the expenditure of the said amount of money, by virtue of the fact that the said claimant filed bond numbers, 582302-K and 582303-K, in the sum of $33,950.00 to secure the faithful performance of the contractor's obligations on alterations to a factory building being constructed [54] for the General Electric Company in Ontario, California; that the contractor whose acts were bonded by the American Surety Co. of New York is the bankrupt herein; that after a hearing upon an objection to the claim itself, said claim was allowed as a general claim in the sum of $6,987.48.

III.

That subsequent to the hearings on the objections to the claim, your petitioner has ascertained that of the creditors of the class for whom said bond was written by the American Surety Co. there remains unpaid approximately five of said creditors; that three of said creditors, to wit, Propert Mfg. Co. in the sum of $385.00, Jack Campbell in the sum of $805.10 and Tony A. Stevens have filed claims in the within bankruptcy proceedings arising from said General Electric job, and it further appears that the said creditors were not paid by the American Surety Co. of New York for the reason that they had not filed their claims with the company within the time prescribed by law; that the total amount

of claims which have been filed in the within estate and which represent creditors of the class for which the bond was written, total the sum of $1336.11.

IV.

That from the facts and the law applicable thereto, it appears to your Petitioner that any dividend which might otherwise be payable to the American Surety Co. of New York on its claim of $6,987.48 should be pro rated to the three creditors named herein above; in addition to their normal pro rata dividend as general unsecured creditors the difference of the dividend otherwise payable to the American Surety Co. of New York should be applied until their three claims have been paid in full and not until then should the balance remaining of the percentage of the general dividend otherwise payable to the American Surety Co., be paid to it.

[52]

Wherefore, this Petitioner prays that this court issue an Order directing the American Surety Co. of New York to show cause why the dividend which would otherwise be payable to it on its general claim should not be applied to the three accounts specified in the within petition until said creditors have been paid in full, and then the balance of the dividend, if any, paid to the said American Surety Co. of New York.

Dated: February 18th, 1943.

PAUL W. SAMPSELL,
Petitioner.

MARTIN GENDEL and
NAT ROSIN,
By MARTIN GENDEL,
Attorneys for Trustee.

(Duly Verified by Paul W. Sampsell.) [53]

Filed Feb. 23, 1943 at 45 Min. past 3 o'clock P. M. Ernest R. Utley, Referee; Louise Rodgers, Clerk.

[Endorsed]: Filed July 26, 1943. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy. [55]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE RE AMERICAN SURETY CO. OF NEW YORK

To: The American Surety Co. of New York, and to E. B. Howorth, Esq., its attorney:

Upon reading and filing the verified petition of Paul W. Sampsell, Trustee, and good cause appearing therefrom, and upon the motion of Martin Gendel and Nat Rosin, Attorneys for the Trustee, said American Surety Co. of New York is hereby directed to appear before the undersigned Referee at his court room located on the third floor of the Federal Building, Los Angeles, California, on the 4th day of March, 1943, at the hour of 10:00 A. M., or as soon thereafter as counsel can be heard, and

then and there to show cause why the prayer of the petition for the order to show cause, a copy of which is attached hereto, should not be granted.

Dated this 23rd day of February, 1943.

ERNEST R. UTLEY,
Referee in Bankruptcy. [56]

(Affidavit of Service by Mail.)

Filed Feb. 23, 1943 at . . Min. past 5 o'clock P. M. Ernest R. Utley, Referee; Louise Rodgers, Clerk.

[Endorsed]: Filed July 26, 1943. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy. [58]

[Title of District Court and Cause.]

PROOF OF CLAIM OF AMERICAN SURETY CO. OF NEW YORK

State of New York
County of New York—ss.

At the Borough of Manhattan, in the City, County and State of New York, on the 9th day of January, 1942, personally appeared William Goetz of Jamaica, in the City of New York, in the County of Queens and State of New York, and made oath as follows:

That he is Treasurer of the American Surety Company of New York, a corporation incorporated under and by virtue of the laws of the State of New York and having its principal office and place of business at 100 Broadway, in the Borough of

Manhattan, in the City, County and State of New York; that said corporation is licensed to do business in the State of California.

That the said bankrupt against whom a petition for adjudication of bankruptcy has been filed was at and before the filing of said petition, and still is, justly and truly indebted to the American Surety Company of New York in the sum of $6,987.48; that the cause of said debt is as follows; that on or about the 3rd day of January, 1941, said bankrupt made written application to the American Surety [59] Company of New York to act as his surety in the amount of $33,950.00 in favor of all persons furnishing materials used in, upon, for or about the performance of the work contracted to be executed or performed under the contract dated January 2, 1941, between the General Electric Company and C. B. Stratton, doing business as the Stratton Construction Company, and in connection with a bond dated January 3, 1941, executed by C. B. Stratton, doing business as the Stratton Construction Company, as principal, American Surety Company of New York, as surety, and General Electric Company, as owner, in the amount of $33,950.00, in connection with a contract dated January 2, 1941, between the principal and the owner for alterations to factory building for the General Electric Company at Ontario, California, and in and by said application, the said bankrupt did, among other things, agree that he would at all times indemnify and save the surety harmless from and against any claim of every nature whatsoever, including counsel fees, and

would place the surety in funds sufficient to defray all expenses and judgments that may be rendered thereon.

That on the 3rd day of January, 1941, the said American Surety Company of New York did, as surety, execute its bonds as aforesaid for the said C. B. Stratton, doing business as the Stratton Construction Company.

That thereafter claims were filed against the American Surety Company of New York by individuals and concerns who furnished labor and materials to the C. B. Stratton Construction Company in connection with the prosecution of the work covered by the contract between the C. B. Stratton Construction Company and General Electric Company dated January 2, 1941.

That on the 13th day of December, 1941, American Surety Company of New York paid, as surety for the said bankrupt, the sum of $4,767.09 to Soule Steel Company, $1,498.42 [60] to Emil Brown and Company, $265.78 to Harold Shugat Company, $126.85 to Valley Window Cleaners, $66.64 to Shattuck Lumber Company for a total of $6,724.78; that the said surety did further expend in ascertaining as to the correctness of its liability the sum of $253.50 to Robert M. Larson, a certified Public Accountant of Pasedena, California, and the sum of $9.20 to E. B. Howorth for services and disbursements as is set forth on the statement attached hereto and made a part hereof and for all of which said sums the said bankrupt, under his agreement

of indemnity, photostat copy of which is attached hereto and made a part hereof, is made liable.

That no part of said debt has been paid; that there are no off-sets or counter claims therefo; that no judgment has been rendered on said debt; that the said American Surety Company of New York has not, nor has any person by its order, or to its knowledge or belief for the use of the said American Surety Company of New York, had or received any amount of security from the said bankrupt for any debt whatsoever.

Said claimant hereby constitutes and appoints E. B. Howorth claimant's true and lawful attorney in fact to represent said claimant in said matter, with full power to attend the meeting or meetings of creditors of the bankrupt aforesaid at a Court of Bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter, or at such other time and place as may be appointed by the Court for holding such meeting or meetings, or at which meeting or meetings, or any adjurnment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of the undersigned to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bank-
[61] rupt, and for the undersigned to assent to such appointment of trustee, and with like authority and powers to attend and vote at any other meeting or

meetings of creditors, or sitting or sittings of the Court, which may be held therein or for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due the undersigned under any composition, and for any other purposes whatsoever in the interests of the undersigned, with full power of substitution, and the undersigned does hereby revoke any and all prior powers of attorney that may have been given by the undersigned.

WILLIAM GOETZ,
Treasurer of the American Surety Company of New York.

Subscribed and sworn to before me this 9th day of January, 1942, and also acknowledged on this day by the subscriber, who is personally known to me.

[Seal] JAMES S. PRIEST, SR.,
Notary Public, Queen's County. Queens Co. Clerk's Ctf. #3719; Register's #8801. Kings Co. Clerk's Ctf. #64; Register's #3233. New York Co. Clerk's Ctf. #633; Register's #3-P-391. Commission Expires March 30, 1943. [62]

Surety Salvage

American Surety Company of New York

Salvage No. 187748

STATEMENT OF ACCOUNT IN THE CASE OF
C. B. STRATTON

CLAIM PAID

12-20-41	Soule Steel Company	$4,767.09	
12-20-41	Emil Brown & Company	1,498.42	
12-23-41	Valley Window Cleaners	126.85	
12-23-41	Shattuck Lumber Company	66.64	
12-29-41	Harold Shugat Company	265.78	
			$6,724.78

EXPENSES

11- 4-41	E. B. Howorth	$ 9.20	
11- 4-41	Robert M. Larson	253.50	262.70
	Balance Due as of 1-9-42		$6,987.48

VWN-DLM
1-9-42

[63]

Agency at.....State of.....
Name .....
(Agent or Attorney)
Branch Office at.....
Bond No. 582302-K
582303-K
Sub. Ag'y Bond No.....

(Cut)
Company's Home Office
Building
American Surety Company
of New York
(Organized 1884)

Application for Contract, Bid or Maintenance Bond

Note—These should accompany this application:

1. Financial Statement, Form C 703 with schedules.
2. Copy of Contract, or in case of a bid, of advertisement, instructions and bid showing date and signatures. (Copy contract to follow.)
3. Copy of specifications, and of every contract, franchise or other document referred to in, made part of or governing the contract or bid. Plans as a rule not necessary.

Place and Date of this Application) ..... (Place) ..... 19.. (Date)

To American Surety Company of New York

Application is hereby made for a bond of suretyship, as follows:

1. Name and business address of applicant.
   (In the case of a partnership add name of each partner; in the case of a corporation add names of the four principal officers, and state date of organization or incorporation.)

C. B. Stratton doing business as Stratton Construction Company

2. Name and address of obligee to whom bond is to be given
(Give full name as per contract.)
General Electric Company

3. Give concise description of proposed work, and location Alterations to factory building for the General Electric Company, Ontario, California.

4. Place and date of bid opening, if any.....

5. Date of Contract Jany 2, 1941

6. Contract price, $33950.00

7. Time for completion.....

8. Penalty for delay.....

9. Terms of payment, and reserved percentage....

10. Terms and duration of guarantees of efficiency, maintenance and repairs, if any, in contract or specifications .....

10a. Is maintenance to be covered by this bond?...

11. Amount of bond F.P. $33,950.00
L.M. $33,950.00

12. Time limit for suit.....

13. Name and address of architect or engineer in charge .....

13a. State whether Fire Insurance will be placed by you or by the owner.....

14. Will you sublet any part of the work? If so, state nature and amount.....

15. Will you require subcontractors to give bonds? Corporate or private? ..... [64]

[Printed in Margin]: Note—If the required information is not given in response to the foregoing questions, it may be necessary to return this blank for completion. The answers will be treated as strictly confidential.

16. Give all other bids. If more than 5 bids tabulate on separate sheet and attach.

[No Entries]

17. Name 2 or 3 large contracts that you have completed similar to the one here considered, giving in each case

[No Entries]

18. State number of years experience as contractor

19. List of contracts now being performed, with location, amount and percentage completed.

[No Entries]

20. Have you ever applied to any other source for a bond for this contract? If so, state when, and to whom, and with what result.

.....

21. Have you furnished bonds before? Give names of your sureties. What bonds are now outstanding? .....

22. Are you engaged or interested in any other line of business? If so, state its nature, location, firm name, names of partners, etc.

.....

23. Have you, or if a firm or corporation, has said firm or corporation, or any firm or corporation or individual to which it is a successor, or any member of said firm, ever compromised with its or his creditors, or become bankrupt or in any other way became discharged from its or his debts otherwise than by payment thereof in full? If so, state details thereof, in full, in confidential letter to be annexed.....

24. Do you carry Messenger or Paymaster Robbery or Hold-up Insurance?.....
If so, give particulars.....

24a. Have you arranged for Public Liability, Property damage and Fire Insurance to cover this particular project? .....[65]

[Printed in Margin]: Note—If the required information is not given in response to the foregoing questions, it may be necessary to return this blank for completion. The answers will be treated as strictly confidential.

25. References. Give name of your banker, an architect or engineer, an owner, also supply houses who have granted you credit.

[No Entries]

Should the American Surety Company of New York, hereinafter called the Surety, execute or procure the execution of the suretyship hereinbefore applied for or other suretyship in lieu thereof, or in connection therewith, the undersigned, hereinafter called the Indemnitor, does (if there be more

than one Indemnitor they jointly and severally and for each other do) in consideration thereof hereby undertake and agree:

I. That the statements contained in the foregoing application are true.

II. That the Indemnitor will immediately pay the Surety the premiums herein agreed upon, to wit:

(a) Proposal Or Bid. If the bond be a "Proposal" or "Bid" bond $..... in advance; if, however, such "Proposal" or "Bid" bond shall by its terms, operate as a "Contract" bond then the regular charge for a contract bond, as provided in the next three succeeding paragraphs marked (b) (c) and (d). If the "Proposal" or "Bid" bond be superseded by a final "Contract" bond of the Surety the premium charge for such proposal or bid bond will be credited on the premium for the contract bond.

(b) Contract Bond. If the bond be a "Contract" bond, or similar instrument, covering the performance of the contract or indemnifying against its non-performance, $509.25 in advance, for the term of 24 months and annually thereafter a premium calculated at the rate of .... per cent on the amount of unfinished contract at each annual renewal. Should the amount of the contract herein stipulated, and upon which premiums are based, be increased or decreased, it is understood and agreed that the premium will be adjusted accordingly, calculated at the date upon which the premium hereinabove stipulated is calculated.

(c) Maintenance Or Guarantee. If any maintenance or guarantee of the work, after completion, is provided for in the contract, for a term exceeding one year, for which either the contract bond or any separate bond which may be executed is liable, the undersigned agrees to pay the Surety in advance for the entire term of said maintenance guarantee a premium of $.....

(d) The contract premium, if there be no maintenance or guarantee, will be paid as above, until the Surety shall be discharged or released from any and all liability and responsibility upon said bond, and all matters arising therefrom, and competent written legal evidence of such discharge or release, satisfactory to the Surety, is served thereon at its Home Office in the City of New York. Where the contract bond covers any maintenance or guarantee of the work, the contract premium will be paid, as above, until the undersigned furnishes the Surety with like evidence of the completion of the contract, which will be the commencement date of maintenance and maintenance premium.

III. That the Indemnitor will perform all the conditions of the bid and/or contract bond herein, and any and all alterations, modifications, renewals and extensions thereof, and will at all times indemnify and save the Surety harmless from and against every claim, demand, liability, cost, charge, counsel fee (including fees of special counsel whenever by the surety deemed necessary) expense, suit, order, judgment and adjudication whatsoever, and will place the Surety in funds to meet the same

before it shall be required to make payment and in case the Indemnitor requests the Surety to join in the prosecution or defense of any legal proceeding, the Indemnitor will, on demand of the Surety, place it in funds sufficient to defray all expenses and all judgments that may be rendered therein.

IV. That the suretyship is for the special benefit of the Indemnitor and the Indemnitor's property now owned or hereafter acquired and the income and earnings thereof, from all of which the Surety shall be entitled to indemnity; and the Indemnitor represents that it is specially and beneficially interested in the award or contract, the continuance thereof and in the suretyship.

V. That the Surety shall have every right and remedy, which a personal surety without compensation would have, the right to secure its discharge from its suretyship, and should it make payment hereunder, shall have every right and remedy of the Indemnitor for the recovery of the same. The Surtey is hereby expressly authorized to fill up any blanks left herein, and to correct any errors in the description of said bond or bonds or any of them, or in the amount or date of payment of said premium or premiums.

VI. That this agreement shall cover the suretyship above recited and all alterations, renewals, extensions and modifications thereof which may be requested or assented to by the Indemnitor or by the Principal named in the bond or obligation. The Surety is hereby authorized to assent to any

changes in or modifications of the contract, plans, specifications, bond and suretyship without notice to or the request of the Indemnitor. That the Surety shall have the right to pay or compromise any expense, claim or charge of the character enumerated in this agreement, and the voucher or other evidence of such payment shall be prima facie evidence of the propriety thereof and of the Indemnitor's liability therefor to the Surety.

VII. That the release by the Surety of any indemnity or security by it held, or the acceptance by the Surety of other or additional security, indemnity or consideration, shall not be a waiver of any right or remedy of the Surety; nor shall it release the Indemnitor from any obligation hereunder.

VIII. That the Indemnitor hereby dedicates all plant and material owned or acquired by it to the performance of the contract referred to herein and further agrees in the event of failure to complete or carry on the contract covered by said suretyship to assign and does hereby assign to the said Surety, all right, title and interest of the Indemnitor in and to all the tools, plant, equipment and materials of every nature and description that the Indemnitor may have upon the work provided for in the contract covered by said suretyship, or in, on or about the site thereof, including as well materials purchased for or chargeable to such contract, which may be in process of construction, on storage elsewhere, or in transportation to said site; and the Indemnitor further agrees to assign and hereby

does assign to the said Surety, all the former's rights in and to all sub-contracts which may be entered into and the materials embraced therein appertaining to said contract; and the Indemnitor further agrees in the event of any breach or default on his part in any of the provisions of the contract and/or bond that the said Surety, as surety, shall be subrogated to all the rights and properties of the Indemnitor in such contract, including deferred and reserved payments, current and earned estimates and final payments, and any and all moneys and securities that may be due and payable at the time of such default on this or any other contract of the Indemnitor or any one or more of them on which the Surety is or may become surety, or on account of extra work or materials supplied in connection therewith, or that may thereafter become due and payable on account of said contract or any other contract of the Indemnitor or any one or more of them on which the Surety is or may become surety.

[Printed in Margin]: If this application is declined the Company reserves the right to withhold the reason therefor, if deemed necessary, as all information relative thereto is regarded as confidential.

IX. All the terms and conditions of this agreement shall stand for the protection of any co-surety, any reinsuring company or any other surety procured by the American Surety Company of New York above named, whether the American Surety

Company of New York does or does not execute or retain any portion of any such obligation.

X. That in case of the failure of any Indemnitor to execute this obligation, or if the execution hereof by any one or more Indemnitors shall be invalid or defective, the remaining Indemnitors shall be and remain as fully liable as if such defect or invalidity had not existed.

XI. Pronouns appearing in this agreement, whether singular or plural, are to be construed as referring to the Indemnitor, though the Indemnitor be one or more individuals, partnerships, associations or corporations.

.....

.....

.....

Signed and sealed Jany 3rd, 1941.

Signed, sealed and delivered in presence of:
C. I. (Illegible)

Applicant sign here
(Seal) C. B. STRATTON
MRS. C. B. STRATTON

Acknowledge Signatures On This Page
[No Entries]

Filed Jan 13, 1942 at .... min. past 10 A.M. Ernest R. Utley, Referee in Bankruptcy, by Louise Rodgers, Clerk.

[Endorsed]: Filed July 26, 1943. Edmund L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy. [66]

[Title of District Court and Cause.]

PROOF OF DEBT AND LETTER OF ATTORNEY

Jack Campbell, Claimant

At Los Angeles, in the Southern District of California, on the 21st day of November, 1941, came Jack Campbell of South Gate, in the County of Los Angeles, in said district, personally known to me, and made oath and says:

I.

(1) Deponent is the owner of the business known as ..... and trades under that name.

(2) Deponent is a member of the partnership firm of ..... consisting of himself and ..... of ..... in the County of ....., and State of ..... and is duly authorized to execute the letter of attorney incorporated herein and has executed the same on behalf of said firm.

(3) Deponent is an officer (or agent), to wit: ..... of ....., a corporation incorporated by and under the laws of the State of ..... and carrying on business at ..... in the County of ....., and State of ..... and is duly authorized to make this proof and execute the letter of attorney incorporated herein, and has executed such letter of attorney on behalf of said corporation.

(4) Deponent is the attorney (or authorized agent) of ..... in the County of ..... and State of ..... This deposition cannot

be made by said principal in person because.....
.....and deponent is duly authorized by his said principal to make this affidavit and to execute the letter of attorney incorporated herein and has executed such letter of attorney on behalf of said principal, and it is within his knowledge that the hereinafter mentioned debt was incurred as and for the consideration hereinafter mentioned, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

II.

The above named bankrupt ....., the person by or against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said claimant in the sum of $897.50 and the nature and consideration of said debt are as follows: Labor, services, goods, wares and merchandise sold and delivered within four years last past by the claimant, ~~an~~ itemized bills of which, marked Exhibit "A," and Exhibit "B" are hereto annexed and referred to as a part hereof. (5).

.....
.....

that no part of said debt has been paid, no note has been received, nor judgment rendered for said indebtedness, nor for any part thereof, except as hereinabove stated; that there are no setoffs or counterclaims to the same; that the purchase price of said goods, wares and merchandise became due on the dates set out on said itemized bill; and that said

claimant has not, nor has any other person by claimant's order, or to the knowledge or belief of deponent, or for claimant, had or received any manner of security whatever for said debt, that the within claim is free from usury as defined by the laws of the place where the debt is contracted.

[Printer's Note]: Large checkmark over face of this paragraph.

III.

Said claimant hereby constitutes and appoints Bruhnke & Silver and/or Martin Gendel or their representatives and each of them, claimant's true and lawful attorney in fact to represent such claimant in said matter, with full authority to attend the meeting or meetings of creditors of the bankrupt, aforesaid, at a Court of Bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court, in said matter, or at such other time and place as may be appointed by the Court, for holding such meeting or meetings, or at which meeting or meetings, or any adjournment or adjournments, thereof, may be held, and then and there from time to time, and as often as there may be occasion for and in the name of claimant, to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress, relating to bankruptcy; and in the choice of trustee or trustees, of the estate of said bankrupt, and for claimant to assent to such appointment of trustee, and with the powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings, of the court, which may be held therein for any other purposes aforesaid; also

to accept or reject any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money to claimant under any composition or otherwise, and for any other purpose whatsoever, in the interest of claimant, with full power of substitution, and claimant does hereby revoke any and all prior Powers of Attorney that may have been given by the claimant.

Personal signature here only (6)

JACK CAMPBELL
Deponent

(Do not sign Firm or Corporate Name.)

Claimant or as such officer, member, agent or attorney of Claimant.

Subscribed, sworn and acknowledged before me this 21st day of November, 1941.

[Seal] S. ROBERSON

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Sept. 12th, 1943. [67]

Directions

Important

(Notes and other writings received and copies of invoices must be attached. Mere statements are insufficient, itemized invoices are required.)

If Claimant a Corporation

The claim must be signed by a duly authorized officer of the Corporation.

If Claimant a Partnership

Use bracket (2).

If Claimant an Individual Using a Trade Name

Use bracket (1).

If Claimant an Individual Is a Creditor Under His Own Name

Ignore brackets (1) to (4) inclusive.

If Claimant an Individual or Partnership Acting by Agent

Use bracket (4). Do not make proof this way unless absolutely necessary as sufficient reasons must be given why proof not made by principal or same is void.

General Directions

If the consideration is not goods sold and delivered, blank space (5) may be used to set forth the true consideration, where the claim is based on a promissory note, or other writing, the consideration for the same must be stated. In bankruptcy, such writings do not import consideration as in State court. The signature at blank space (6) must always be that of the individual who makes the proof. No Corporate, Partnership or Principal's Name Must Appear Here or the Proof Will Be Void. Claims must be filed in the office of the Referee, within six months from the date of adjudication in Bankruptcy but a claim filed within the six months period, may, for good cause, be amended at any time prior to the conclusion of the final dividend meeting.

EXHIBIT A

Phone LAfayette 6432

Jack Campbell
Service Station Painting

2782 Firestone Blvd.
South Gate, Calif.

November 19, 1941

To Whom it may concern,

As proof of claim against Stratton Construction Co. 119 North Oak Street, Temple City, California Debt consists of labor only, furnished on building of General Electric Corp. Officies and Plant at Hot Point, Ontario, California

Original Contract dated May 5th. 1941 for Sum of $1510.00

Extras or additional work added to as work progressed 646.50

Balance $2156.50

Received in checks and cash as part payment 1232.57

Deducted from my invoice in payment of bill 923.93

owed Temple City Building Materials Co. for purchase of paint, etc. ..... $ 118.83

Balance due ..... $ 805.10

Work Completed September 4th. 1941

JACK CAMPBELL [69]

EXHIBIT B

Phone LAfayette 6432

Jack Campbell
Service Station Painting

2782 Firestone Blvd.
South Gate, Calif.

November 19, 1941

To Whom it may concern
As proof of claim against Stratton Construction Co.
119 North Oak Street, Temple City, California
Debt consists of labor only, furnished on cooking building of South Santa Anita School North Oak St. Temple City, Calif.
Total invoice $92.40
Work started Sept. 24, 1941
Work Completed Oct. 8, 1941

JACK CAMPBELL

Filed Jan. 13, 1942. Ernest R. Utley, Referee, by Louise Rodgers, Clerk.

[Endorsed]: Filed Jul. 26, 1943 at 45 min. past 4 o'clock P.M. Edmund L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy. [70]

[Title of District Court and Cause.]

PROOF OF CLAIM AND POWER OF ATTORNEY

(1) Tony Stevens

(2) Claimant's Social Security No. 559-20-0260

State of California,
County of Los Angeles—ss.

(3) S. W. Godfrey of 1102 So. Edith, City of Alhambra, County of Los Angeles, State of California, being duly sworn, deposes and says:

(4) That deponent is transacting business under fictitious name of .....

(5) That deponent is a member of ....., a copartnership composed of deponent and .....

.....

(6) That deponent is the ..... of ..... a corporation organized and existing under the laws of the State of ....., and that he is duly authorized to make this proof of claim and to execute the power of attorney herein contained on its behalf.

(7) That deponent is the attorney, or agent, of the claimant and that he is duly authorized by said claimant to make this proof of claim and to execute the power of attorney herein contained in his behalf; and that said proof cannot be made by said claimant in person because agent

.....

That the above named bankrupt was at and before the filing by or against him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted or liable to (8) Tony Stevens in the sum of $445.45 (9).

That the consideration of said debt or liability is as follows: (10) .....

.....

That no part of said debt or liability has been paid and that there are no set-offs or counterclaims thereto; that said claimant does not hold, and has not, nor has any person by his order, or to deponent's knowledge or belief, for his use, had or received, any security or securities for said debt or liability; that the instrument upon which said debt or liability is founded is attached hereto, or is lost or destroyed as set forth in the affidavit attached hereto; that no note or other negotiable instrument has been received for said debt or liability, or any part thereof, except such as is attached hereto; and that no judgment has been rendered on said debt or liability, or any part thereof, except as herein stated.

POWER OF ATTORNEY

Said claimant hereby authorizes (11) G. W. Godfrey of 1102 So. Edith, Alhambra, Calif or any of them, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid, and all adjournments thereof, at the places and times appointed by the court, and for him and in his name to vote for or against any proposal or resolution that may be then submitted under the Act of Congress

relating to bankruptcy, to vote for a trustee or trustees of the estate of the said bankrupt and for a committee of creditors, to accept any arrangement or wage-earner's plan proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends, and payment or delivery of money or of other consideration due said claimant under such arrangement or wage-earner's plan, and for any other purpose in said claimant's interest whatsoever; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid.

[Printer's Note]: Large checkmark placed through two paragraphs.

Designation of Address to Which Notices Shall Be Addressed:

Said claimant hereby requests that all notices to which he may be entitled shall be addressed to the person named in the foregoing Power of Attorney, at his address as therein designated; if no person is named in said Power of Attorney, said claimant requests that said notices be sent to him at the following address:

(12) 1102 So. Edith, Alhambra, Calif.

(13) TONY A. STEVENS

(Personal signature of deponent; do not sign name of claimant unless the claimant and the deponent are the same.)

Subscribed, sworn to and acknowledged before me this 29 day of January, 1942.

[Notarial Seal] N. S. FARRELL

Notary Public in and for the County of Los Angeles, State of California. [71]

Directions

(The numbers refer to the corresponding numbers appearing on the face of this form.)

Distinction Between Claimant and Deponent

The name of the bankrupt must be inserted.

The name of the claimant must be shown in the spaces marked (1) and (8). The name and address of the deponent must be shown in the spaces marked (3). The "claimant" is the person, business, copartnership, corporation, or other legal entity, asserting the claim against the bankrupt. The "deponent" is the individual who makes the claim for or on behalf of the claimant. If the claimant is an individual who is not transacting business under a fictitious name, and if he makes the claim himself, and not by his attorney or agent, the claimant's name and the deponent's name will be the same.

Character of Claimant and Deponent

If the claimant is an Individual Transacting Business Under a Fictitious Name, the fictitious name he uses must be inserted in the bracket marked (4).

If the claimant is a Copartnership, the information required in the bracket marked (5) must be given.

If the claimant is a Corporation, the information required in the bracket marked (6) must be given.

If the deponent is the Attorney or Agent of the Claimant, the information required in the bracket marked (7) must be given.

Amount of Claim

The total amount claimed by the claimant must be given in the space marked (9). If the claim is on An Unsecured Interest Bearing Obligation, the interest should be computed to the date of the filing of the petition for adjudication of bankruptcy, and such interest should be added to the unpaid principal and included in the amount which is shown in the space marked (9). The details of unpaid principal and interest may be shown in the space marked (10) or on a separate sheet attached to the claim.

Consideration Upon Which Claim Is Made

The consideration of the debt or liability upon which the claim is made should be briefly stated in the space marked (10). If the space is not sufficient, a separate sheet should be attached. If the claim is for Goods, Wares or Merchandise, itemized invoices should be attached; if the claim is on a Note or Other Written Instrument, the original thereof should be attached; if the claim is on a Judgment, an abstract thereof should be attached; if the claim is for Wages, Salary or Other Compensation for Services Rendered, the details thereof should be stated, such as the dates when the services were rendered, the rate of compensation, the payments received on account, if any, etc.; if the claimant Claims Priority, in whole or in part, for the reason that his services were rendered Within Three

Months Before the Date of the Commencement of the Proceeding, he should so state on the face of the claim. On all claims for wages, salary or other compensation, the Social Security number of the claimant must be given in the space marked (2).

Power of Attorney

If the claimant so desires, he may insert in the blank spaces marked (11) the name and the address of the person he wishes to appoint, as his attorney in fact, to act for him in connection with his claim, and to receive payment of dividends or other money or other consideration due the claimant.

Designation of Address to Which Notices Shall Be Addressed

If the claimant does not designate an attorney in fact, his own address should be given in the space marked (12).

Signature on Claim

The deponent must sign his own name on the line marked (13). The name of the claimant must not appear on this line unless the claimant and the deponent are one and the same. [72]

[Letter Head]
Tony A. Stevens

1102 S. Edith St., Alhambra
Phone ATlantic 2-5270

Stratton Construction Co.

Statement of Acct. with Tony Stevens

11/28/40	Ventura Blvd. & Rosetta	$ 28.35
7/14/41	General Electric, Ontario	246.01
8/18	Ocean Ave., Santa Monica	25.00
8/22	Extra Work—Gen. Elec.	392.00
9/	Santa Anita School	65.00
	Total	$756.36
	Less Cr. on Gen. Elec.	100.00
	Balance owes T. Stevens	$656.36
[In longhand]:	Due Temple City Bldg. Material Co—from Tony Stevens	210.91
	Balance due Tony Stevens	$445.45

Filed Jan. 30, 1942. Ernest R. Utley, Referee, by Blanche Morris, Clerk.

[Endorsed]: Filed July 26, 1943. Edmund L. Smith, Clerk, by E. M. Enstrom, Jr., Deputy. [73]

[Title of District Court and Cause.]

PROOF OF CLAIM

At Los Angeles, in the Southern District of California on the 17th day of November, 1941, came Edwin R. Probert of Los Angeles, County of Los Angeles, State of California and made oath and says:

That he is an officer of Probert Mfg. Co. Ltd., a corporation incorporated by and under the laws of the State of California, and carrying on business at Los Angeles, County of Los Angeles, State of California and that he is an officer duly authorized by said corporation to make this Proof of Debt and execute this Letter of Attorney, and executed same on behalf of said corporation.

That the said C. B. Stratton d b a Temple City Bldg. Materials Co., and Stratton Constr. Co., the person whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said claimant, in the sum of Three Hundred & Eighty Five Dollars; that the consideration of said debt is as follows: Goods, wares and merchandise sold and delivered within four years last past by the claimant, an itemized bill of which, marked Exhibit "A," is hereto annexed and referred to as a part hereof.

[Printer's Note]: Large checkmark through this paragraph.

That no part of said debt has been paid, no note has been received, nor judgment rendered for said

indebtedness, nor for any part thereof, except as hereinabove stated; that there are no setoffs or counterclaims to the same; that the purchase price of said goods, wares and merchandise became due on the dates set out on said itemized bill; and that said claimant has not, nor has any other person by claimant's order, or to the knowledge or belief of deponent, or for claimant, had or received any manner of security whatever for said debt. That the within claim is free from usury as defined by the laws of the place where the debt was contracted.

Said claimant hereby constitutes and appoints, L. G. Moore or their representatives and each of them, its true and lawful attorney in fact to represent said claimant in said matter, with full authority to attend the meeting or meetings of creditors of the bankrupt aforesaid at a Court of Bankruptcy, wherever advised or directed to be holden, on the day and at the hour appointed and notified by said Court of said matter, or at such other time and place as may be appointed by the Court for holding such meeting or meetings, or at which meeting or meetings or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of claimant to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of said bankruptcy, and for claimant to appoint such trustee or trustees and with like powers to attend and vote at any other meeting or

meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept or reject any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due claimant under any composition or otherwise and for any other purpose whatsoever in the interest of claimant to perform acts and execute consents and documents with full power of substitution and claimant does hereby revoke any and all prior powers of attorney that may have been given by claimant.

EDWIN R. PROBERT,
Sec. Treas.
PROBERT MFG. CO. LTD.

Subscribed and sworn to before me this 17 day of November, A. D. 1941, and also acknoweldged on this date by the subscriber, who is personally known to me.

[Seal] OSCAR E. CLINK,
Notary Public in and for the County of Los Angeles, State of California.
My Commission Expires Aug. 16, 1942. [74]

Instructions for Execution

This instrument should be executed strictly in accordance with the following instructions:

1. If individual, sign on line so indicated.
2. If partnership, member of firm must sign on line so indicated and fill out partnership paragraph, giving name or names of the members of firm.
3. If corporation, an officer should sign on line so indicated and fill out corporation paragraph.

4. All proofs of debt must be acknowledged before a Notary Public.

5. Attach Itemized Statement, Copies of Invoices and Original Promissory Note, if any.

Filed Nov. 29, 1941. Ernest R. Utley, Referee; Blanche Morris, Clerk.

[Endorsed]: Filed July 26, 1943. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy. [75]

[Title of District Court and Cause.]

STIPULATION AS TO CERTAIN FACTS RE ORDER TO SHOW CAUSE RE AMERICAN SURETY COMPANY OF NEW YORK

It Is Hereby Stipulated by and between Paul W. Sampsell, as Trustee for the above named bankrupt, and the American Surety Company of New York, a corporation, through their respective attorneys thereunto duly authorized, as follows:

I.

That the facts in this stipulation may be used by any party or person interested in the above entitled matter and at any stage of the proceedings therein; and that such facts are to be considered in connection with all facts properly inferred, presumed or deduced from all papers now on file herein. [76]

II.

That on or about January 3, 1941, C. B. Stratton, doing business as Stratton Construction Company,

applied to the American Surety Company for a contract bond in connection with his contract with the General Electric Company calling for him to make certain alterations in a factory building at Ontario, California; that said C. B. Stratton is the same person as Charles B. Stratton.

III.

That a true copy of said application and contract of indemnity and reimbursement of said C. B. Stratton in favor of the American Surety Company is attached to the claim herein of the American Surety Company heretofore allowed as a general claim in the sum of $6,987.48.

IV.

That pursuant to said application of C. B. Stratton, the American Surety Company, as surety, and C. B. Stratton, as principal, executed bond No. 582303-K under a form designated as "Laborers & Materialmen, Statutory Form For California" and in words and figures and under date as follows:

"Know All Men By These Presents: That We, C. B. Stratton, doing business as the Stratton Construction Company as principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and duly authorized to transact business under the laws of the State of California, as Surety, are held and firmly bound unto any and all persons, furnishing materials used in, upon, for or about the performance of the work contracted to be executed or [77] performed under the contract hereinafter

mentioned, and all persons who performed work or labor upon the same, and all persons who supply both work and materials, and whose claim has not been paid by the contractor, company, or corporation, in the just and full sum of Thirty-Three Thousand Nine Hundred Fifty and No/100 ($33,950.00) Dollars, for the payment whereof well and truly to be made, said Principal, and Surety bind themselves, their heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

"The Condition of the Foregoing Obligation Is Such, That Whereas the above bounden Principal has entered into a contract, dated January 2, 1941, with General Electric Company to do and perform the following work, to-wit: doing all alterations to factory building for the General Electric Company, Ontario, California

"Now Therefore, if the above bounden Principal shall pay or cause to be paid in full the claims of all persons performing labor upon or furnishing materials to be used in doing the work described in said contract or in any modification thereof, then this obligation shall be void; otherwise to remain in full force and effect. This bond shall inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in said work, giving to such persons a right of action to recover hereon in any suit brought to foreclose mechanics liens arising under said contract or in a separate suit brought upon this bond in an amount

not exceeding, however, in the aggregate of all recoveries, the amount of the bond as above specified.

[78].

"No suit or action on this bond to recover for labor performed or material furnished in respect to work herein referred to shall be sustained unless the same be commenced within the period provided by law after the claimant files his claim of lien, or if he files no such claim of lien, unless the suit or action be commenced within six months after the contractor finally ceases operations on the work described in said contract.

"Signed and Sealed this 3rd day of January A. D. 1941

Witness .....

AMERICAN SURETY COMPANY OF NEW YORK,

By A. I. ZIMMERMAN,
Resident Vice-President.

Attest: LUCILE M. CHESLEY,
Resident Assistant Secretary"

V.

That thereafter and on or about January 7, 1941, the plans and specifications for said alterations in said factory building, an executed copy of the construction contract dated January 2, 1941, between C. B. Stratton, doing business as Stratton Construction Company, and the General Electric Company, and the original of said bond No. 582303-K were filed and recorded in the office of the County Recorder of San Bernardino County, California, the county wherein said factory is located.

VI.

That pursuant to said construction contract, C. B. [79] Stratton, as original contractor, set about to effect said alterations in said factory building; that a notice of completion with respect to said alterations was filed and recorded in the office of said County Recorder on or about September 10, 1941, and that the time for laborers and materialmen to file and record claims of lien in connection therewith expired on or about October 10, 1941; that Section 1183 of the Code of Civil Procedure of the State of California provides in part as follows:

"Filing of bond. In case the surety or sureties on any bond given as in this chapter provided shall have caused said bond to be filed and recorded in the office of the county recorder of the county in which the property is situated, before the work of improvement is completed, then no action may be maintained thereon unless there shall previously have either been filed a mechanic's lien claim as in this chapter provided or unless written notice shall previously have been given to the surety on said bond before the expiration of the time prescribed in this chapter for filing a lien to enforce such claim, which notice shall state that the person giving such notice has performed labor or furnished materials, or both, or furnished appliances, teams or power, to the contractor or other person acting by the authority of the owner, or that they have agreed to do so, stating in general terms the kind of labor, materials, appliances, teams or power and the name of the person to or for whom the same was done or

furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. The filing of an action to foreclose such lien [80] shall not be a condition precedent to a recovery on said bond. If said bond has been so filed as herein last provided then any suit brought against such surety or sureties shall be filed within six months after completion of said structure or work of improvement, as 'completion' is defined in section 1187 of this code."

VII.

That within the time limited by law, the following laborers and materialmen furnishing work and supplying materials to C. B. Stratton, as said original contractor, each filed and recorded claims of lien and lodged written notices with the American Surety Company, as surety, pursuant to the provisions of Section 1183 of the California Code of Civil Procedure: Soule Steel Company, Emil Brown & Company, Harold Shugat Company, Valley Window Cleaners, and Shattuck Lumber Company.

VIII.

That thereafter and on the dates specified in the claim herein of the American Surety Company, the American Surety Company, as surety, paid in full each claim of the laborers and materialmen specified in paragraph VII hereof and in the following amounts:

Soule Steel Company	$4,767.09
Emil Brown & Company	1,498.42
Harold Shugat Company	265.78
Valley Window Cleaners	126.85
Shattuck Lumber Company	66.64
	$6,724.78

[81]

IX.

That Jack Campbell, Probert Manufacturing Company, and Tony Stevens are laborers and materialmen furnishing work and supplying materials to C. B. Stratton as said original contractor; that none of the parties specified in this paragraph ever filed or recorded a claim of lien in connection with said alterations, nor did any of them ever give any notice, either written or oral to the American Surety Company; nor did any of them ever make any demand, either written or oral, upon the American Surety Company; nor did any of them ever communicate with the American Surety Company in any way; nor did any of them ever commence any suit or action against the American Surety Company.

That with respect to the furnishing and supplying of said work and materials specified in this paragraph, said parties have filed claims herein against the estate of the above named bankrupt as follows:

Jack Campbell	$ 805.10
Probert Manufacturing Company	385.00

Tony Stevens (total claim filed $445.45)	146.01
	$1,336.11

That in addition to the above named parties who remain unpaid as specified, there are two other laborers and materialmen in connection with said alterations who remain unpaid in the sum of $259.13; that no claim has been filed herein for said sum of $259.13, or any part thereof.

X.

That there are numerous claims against the estate of the [82] above named bankrupt other than those mentioned in this stipulation.

Dated this 17 day of March, 1943.

MARTIN GENDEL and
NAT ROSIN,
By MARTIN GENDEL,
Attorneys for Trustee.
MATHES & SHEPPARD and
GORDON F. HAMPTON,
Attorneys for American Surety Company of New York.

Filed Mar. 18, 1943 at ... Min. past 11 o'clock A. M. Ernest R. Utley, Referee, Louise Rodgers, Clerk. G

[Endorsed]: Filed July 26, 1943. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy. [83]

[Title of District Court and Cause.]

OPINION

Martin Gendel, Esquire, of Los Angeles, California, representing the Trustee.

Mathes & Sheppard, of Los Angeles, California, attorneys representing the American Surety Company of New York;

Gordon F. Hampton, Esquire, of Los Angeles, California, also representing American Surety Company of New York.

O'Connor, J. F. T., Judge.

This matter comes on for review from Ernest R. Utley, Esquire, Referee in Bankruptcy. Affirmed.

The principal question presented on review from the Referee in Bankrauptcy is: Can a surety, having paid certain claims under its bond given to a contractor who later is adjudged a bankrupt, participate in dividends on its allowed claim from the estate of the contractor before the creditors of the class covered by the bond are paid in full?

The answer is no.

The contractors obtained from the American Surety Company, as surety, a Laborers & Materialmen, Statutory Form of Bond for the State of California as required by the law, "to benefit of persons who perform labor or furnish [84] . . .", etc. ". . . giving to such persons right of action to recover hereon in any suit brought to foreclose

mechanic's lien, or in a separate suit brought upon this bond . . ."

Several of the creditors for whom the bond was given complied with sec. 1183 C.C.P. California, and were paid $6724.78 by the surety company, being the amount of their claims.

Three creditors, with claims amounting to $1336.-11, did not comply with the statute, did not file a mechanic's lien, or give written notice, or commence suit against the surety. They did, however, file their claims in the Bankruptcy Court.

Two other laborers and materialmen failed to comply with the statute and failed to file claims in the sum of $259.13 in the Bankruptcy Court. Judge Paul J. McCormick of this Court, in the matter of Harold C. Strotz, Bankrupt, No. 37,302-M said:

"Section 57 (d) of the Act provides that claims which have been duly proved shall be allowed upon the receipt by or upon presentation to the court. Such claims and no others are to be allowed by the referee. Bankruptcy proceedings are largely a matter of administration by the referee, and the above section especially imposes upon the referee a duty to see that an estate or the fruits of an arrangement in bankruptcy is not distributed among those who fail to prove their legal right to share therein. A referee is more than an arbitrator in matters referred to him. He has the duty to examine the proofs filed and to determine their legal sufficiency. In re Owl Drug Co., 84 F. (2d) 342, (C. C. A. 9); In re Gobel Boat Co. 190 Fed. 92; In re Noble, 15 F. Supp. 648; and when a creditor in some form

calls the attention of the court to a patently stale claim, the referee should su sponte under the provisions of sections 2 (2) and 57 (k) examine it and determine its validity and this the referee should do whether the trustee or the objecting creditor raises specific objections to the sufficiency of the proof filed or not." [85]

The surety company filed a general claim against the bankrupt estate in the sum of $6987.48. This claim was allowed as a general claim.

The Referee made an order directing the Trustee not to pay any dividends on the general claim of the American Surety Company of New York until the claims of the three unpaid creditors, amounting to $1336.11, who were in the class covered by the bond, were paid in full.

The Supreme Court of the United States, in re American Surety Co. v. Westinghouse Electric Manufacturing Co. 296, U. S. 133, 29 A. B. R. (N.S.) 655, is authority for sustaining the order of the Referee:

"A surety who has undertaken to pay the creditors of the principal, though not beyond a stated limit, may not share in the assets of the principal by reason of such payment until the debts thus partially protected have been satisfied in full"

Again, the Supreme Court of the United States said:

"A surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied."

United States v. National Surety Co. 254 U. S. 73.

Prudence Realization Corp. v. Geist, U. S. Supreme Court (1942) 62 S. Ct. 978, 48 A. B. R. (N. S.) 695.

Jenkins v National Surety Co. 277 U. S. 258.

The fact that the three creditors did not elect to comply with sec. 1183 C.C.P., but looked to the bankrupt estate to pay their claims, does not estop them from having their claims paid by the estate prior to the payment of the claim of the surety. American Surety Company of New York v. Westinghouse Electric Manufacturing Co., supra.

Collier on Bankruptcy, Volume 3, pages 284 to 296. [86] makes the following comment:

"A mere partial discharge of the principal debt by the surety, be it prior or subsequent to the date of the filing of the petition in bankruptcy, falls squarely under Sec. 57i . . . Thus if the claim originally amounted to $1,000 and the surety paid $750 thereon, the original creditor, since his obligation is not paid in full and even though he has received $750.00, may file a claim for the full $1,000 and continue to receive dividends on the entire amount of the claim until the amount of the surety's payment plus the dividends amount to 100% of the claim. . . Then only may the surety assert his right to further dividends based on that part of the original claim to which he was subrogated ($750) . . ."

"In this respect there is no difference between a surety who is secondarily liable for the full amount of the principal debt and one who limited his lia-

bility to a certain maximum (smaller than the principal debt) on which he is surety. Both have to wait until the principal creditor is fully satisfied."

At first glance this doctrine may seem harsh. True, the surety has paid out money—discharged a claim against the bankrupt—but, as a surety, he stood in the shoes of the bankrupt to the extent that he was obligated to pay these claims. The surety's obligation was supported by a consideration, and in many instances security is required in addition to the premium exacted. Toward the class of creditors covered by the bond, the bankrupt and the surety stood shoulder to shoulder. The surety is charged with knowledge of the law as declared by our Supreme Court. The decisions are clear and hold contrary to the contention of the surety.

There is an imperative duty imposed upon the Trustee and he is required to distribute the estate according to law, and therefore has an interest in the controversy. The rights of the surety under the doctrine of subrogation or an assignment by the creditors, is discussed in Meyers v. Bank of America National Trust and Savings Association, 11 Cal 2nd. 92; 60 C. J., page 749.

The order of the referee is affirmed.

Dated December 17, 1943.

J. F. T. O'CONNOR
U. S. Dist. Judge.

[Endorsed]: Filed Dec. 17, 1943. Edmund L. Smith, Clerk, by Francis E. Cross, Deputy Clerk.

In the District Court of the United States
Southern District of California
Central Division

No. 39606—O'C

In the Matter of

CHARLES B. STRATTON dba Temple City Building Co., and Stratton Construction Co.,
Bankrupt.

ORDER AFFIRMING REFEREE re AMERICAN SURETY COMPANY OF NEW YORK

Pursuant to the petition of American Surety Company of New York a review was duly held before the undersigned Judge concerning the Order of Referee Ernest R. Utley, made on the 15th day of June, 1943, whereby the payment of dividends to the Petitioner was subordinated to the payment of certain claims, all as recited in said Order of the Referee; Points and Authorities were duly filed by counsel for the Petitioner and by counsel for the Trustee, and the matter came on for hearing before the undersigned Judge after due notice thereof, and the same was argued before this court by Mathes & Sheppard appearing by Gordon F. Hampton, Esq., as attorneys for the Petitioner, American Surety Company of New York, and by Martin Gendel, Esq., as attorney for the Trustee; and after considering the record on review and the arguments advanced by counsel, and good cause appearing therefor: [88]

It Is Hereby Ordered that the Order of the Referee dated June 15, 1943, is affirmed.

Dated this 21 day of December, 1943.

J. F. T. O'CONNOR
United States District Judge.

Judgment entered Dec. 21, 1943. Docketed Dec. 22, 1943, Book C. O. 22, Page 464. Edmund L. Smith, Clerk. By Francis E. Cross, Deputy. [89]

In the District Court of the United States
Southern District of California
Central Division

No. 39 606 O'C

In the Matter of

CHARLES B. STRATTON, doing business as TEMPLÆ CITY BUILDING CO., and STRATTON CONSTRUCTION CO.,
Bankrupt.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,
Appellant.

NOTICE OF APPEAL

To: The Honorable J. F. T. O'Connor, Judge of the Above Named Court, The Clerk of Said Court, Paul W. Sampsell As Trustee In Bankruptcy, and Martin Gendel and Nat Rosin, Attorneys For said Trustee:

You, And Each Of You, will please take notice, and notice is hereby given, that American Surety Company of New York, a corporation, a claimant and petitioner in the above entitled cause, hereby appeals to the Circuit Court of Appeals for Ninth Circuit from that [90] certain order, final judgment, and decree entitled "Order Affirming Referee re American Surety Company of New York" entered in this cause in Civil Order Book 22 at page 464 on December 21, 1943, and docketed on December 22, 1943.

Signed: MATHES & SHEPPARD
By GORDON F. HAMPTON
Attorneys for Appellant American Surety Company of New York, a corporation.
Address: 458 South Spring Street, Los Angeles (13) California.

[Endorsed]: Filed and mailed copy to Martin Gendel and Nat Rosin, Attys. for Trustee, Jan. 29, 1944 at 30 min. past 11 o'clock A. M. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy. [91]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF ORDER

To: American Surety Co. of New York, and to Mathes & Sheppard, Esqs., its attorneys:

You, And Each Of You, Will Please Take Notice, that the Order Affirming the Referee was signed by Honorable J. F. T. O'Connor, Judge of the District Court on December 21, 1943, filed on said date and has been entered in Civil Order Book 22 at page 464 under date of December 21, 1943, and docketed on December 22, 1943.

Dated this 23rd day of December, 1943.

MARTIN GENDEL
Attorney for Trustee.

(Affidavit of Service by Mail.)

Filed Dec. 23, 1943. Ernest R. Utley, Referee. B. K., Clerk

[Endorsed]: Filed Feb 2, 1944. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy.

[91½]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That American Surety Company of New York, a corporation, as principal, and New York Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of New York and duly authorized to transact business in the State of California, as surety, are held firmly bound unto Paul W. Sampsell as Trustee in Bankruptcy in the sum of Two Hundred Fifty ($250.00)

Dollars, lawful money of the United States of America to be paid to the said Paul W. Sampsell as Trustee in Bankruptcy, his attorney, successors or assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally.

Sealed with our seals and dated this 24th day of February, 1944.

Whereas, on December 21, 1943, in the above entitled cause in the District Court of the United States for the Southern [93] District of California, Central Division, an Order, Final Judgment and Decree was rendered, entitled: "Order Affirming Reference re American Surety Company of New York", and said American Surety Company of New York, a corporation, has duly filed Notice of Appeal from said Judgment;

Now, Therefore, the condition of this obligation is that if the said American Surety Company of New York, a corporation, shall prosecute its appeal with effect and pay all costs, if the appeal is dismissed, if said Order, Final Judgment and Decree is affirmed, or such costs as the Appellate Court may award if the said Order, Final Judgment and Decree is modified, then, this obligation to be void; otherwise, in full force and effect.

In Witness Whereof, the said principal has hereto caused its name and corporate seal to be affixed by its duly authorized officers, and said surety has hereto caused its name and corporate seal to be

affixed by its duly authorized officers, this 24th day of February, 1944.

AMERICAN SURETY COMPANY OF NEW YORK
By JOHN GURASH
Resident Vice President.

Attest:

LUCILE M. CHELSEY
Resident Assistant Secretary

NEW YORK CASUALTY COMPANY
By A. E. KRULL

Attest:

I. TAYLOR
Resident Assistant Secretary

Premium charged for this bond is $10.00 per annum. 428588E

I hereby approve the foregoing bond.

Dated the 24th day of Feby, 1944.

J. F. T. O'CONNOR
Judge.

State of California,
County of Los Angeles—ss:

On this 24th day of February A. D. 1944, before me, Ivy Taylor, a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared John Gurash personally known to me to be the Resident Vice-President and Lucile M. Chesley, personally known to me to be the Resident

Assistant Secretary of the American Surety Company of New York, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal) IVY TAYLOR

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Aug. 12, 1946.

State of California,
County of Los Angeles—ss.:

On this 24th day of February A.D. 1944, before me, Lucile M. Chesley, a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. E. Krull, personally known to me to be the Resident Vice-President and I. Taylor, personally known to me to be the Resident Assistant Secretary of the New York Casualty Company, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal) LUCILE M. CHESLEY

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Apr. 16, 1945.

[Endorsed]: Filed Feb. 25, 1944. Edmund L. Smith, Clerk, By E. M. Enstrom, Jr., Deputy. [94]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The appellant states that the points upon which it intends to rely on the appeal in this action are as follows:

1. The Order Affirming Referee re American Surety Company of New York is erroneous in that it is assumed therein that the three claimants represented here by the trustee are, or at any time were, creditors of the surety under the bond.

2. Said order is erroneous in that it ignores the fact that said three claimants are not and never were creditors protected by the bond of the surety. [95]

3. Said order is erroneous in that it disregards the rule that a surety is entitled to indemnity, reimbursement, and subrogation from the estate of

its bankrupt principal when such surety has paid in full and made whole all creditors to whom it is obligated as surety.

4. Said order is erroneous in that it deprives appellant of its pro rata dividend to which it is entitled as a surety who has paid in full and made whole all creditors to whom it at any time became obligated as surety or otherwise.

5. Said order is erroneous in that it orders that any dividend payable to appellant on its allowed general claim shall be first applied to the general claims of said three claimants (Jack Campbell, Probert Manufacturing Company, and Tony Stevens) until such claims have been paid in full.

6. Said order is erroneous in that it disregards the provisions of Section 1183 of the Code of Civil Procedure of the State of California under which appellant filed Bond No. 582303-K and thus accomplishes by indirection in bankruptcy that which could not be accomplished directly by any suit brought on said bond by said three claimants, or any of them.

7. Said order is erroneous in that it violates the terms of Bond No. 582303-K and thus accomplishes by indirection that which could not be accomplished directly.

8. Said order is erroneous in that it amounts to the making of a new surety contract by giving rights to [96] claimants not protected by the bond and then subjecting the surety to a retractive liability thereunder.

9. Said order is erroneous in that it orders the dividend payable on the allowed general claim of appellant to be limited to a sum less than a dividend "of an equal per centum" on an allowed claim in contravention of section 65(a) of the Bankruptcy Act.

10. Said order is erroneous in that it orders the dividends payable on each of the claims of said three claimants (Jack Campbell, Probert Manufacturing Company, and Tony Stevens) to be enlarged to a sum greater than the "equal per centum" to be paid on other general claims and thus contravenes the provisions of section 65(a) of the Bankruptcy Act.

11. Said order is erroneous in that it deprives appellant general creditor of its pro rata dividend from the general assets of the bankrupt's estate and grants to said three claimants as general creditors of the bankrupt all or part of the pro rata dividend belonging to appellant.

12. Said order is erroneous in that it orders the creation of causes of action in the hands of three non-diligent general claimants of the bankrupt against another general claimant and thus by said order a court of equity aids the non-diligent contrary to equitable principles.

13. Said order is erroneous in that it orders summary execution upon the pro rata dividend payable to [97] appellant as a general claimant against whom said three general claimants at no time had any cause of action at law or in equity or otherwise.

14. Said order is erroneous in that it gives said

three general claimants all or part of the dividends payable on appellant's claim even though said three general claimants were precluded and barred from any recovery under said Bond No. 582303-K and section 1183 of the Code of Civil Procedure of the State of California.

15. Said order is erroneous in that it orders seizure of all or part of the pro rata dividend payable to appellant, and thereby said order deprives appellant of property without due process of law in contravention of the provisions of the Fifth Amendment to the Constitution of the United States of America.

16. Said order is erroneous in that it deprives appellant of its contractual right to indemnity from the estate of said bankrupt by reason of the express contract of indemnity between said bankrupt and appellant, and thereby said order deprives appellant of property without due process of law in contravention of the provisions of the Fifth Amendment to the Constitution of the United States of America.

17. Said order is erroneous in that appellee Paul W. Sampsell, as trustee in bankruptcy, is not the real party in interest thereunder and had no standing to petition for said order for the reason that [98] the real parties in interest under said order are said three general claimants (Jack Campbell, Probert Manufacturing Company, and Tony Stevens).

18. Said order is erroneous in that it purports

to determine in bankruptcy a collateral dispute among certain general creditors of the bankrupt.

Dated February 16, 1944.

MATHES & SHEPPARD
and
GORDON F. HAMPTON
Attorneys for American Surety Company of New York, a corporation, Appellant.

[Endorsed]: Filed Feb. 25, 1944. [99]

[Title of District Court and Cause.]

STIPULATION RE DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL

It is hereby stipulated by the parties hereto, through their respective attorneys thereunto duly authorized, that the following shall constitute the transcript of record on appeal:

1. Involuntary Bankruptcy Petition Against Individual;
2. Petition for Order Referring Proceedings to a Referee Under the Provisions of Section 22a of the Bankruptcy Act;
3. Order of General Reference;
4. Order of Adjudication;
5. Subpoena to Alleged Bankrupt; [100]
6. Summary of Debts and Assets;
7. Statement of Affiairs;

8. Discharge of Bankrupt;

9. Referee's Certificate on Review;

10. Findings of Fact, Conclusions of Law, and Order re American Surety Company;

11. Petition for Review of Referee's Order by Judge;

12. Petition of Trustee for Order to Show Cause, re American Surety Company;

13. Order to Show Cause re American Surety Company of New York;

14. Claim of American Surety Company of New York, a corporation;

15. Claim of Jack Campbell;

16. Claim of Tony Stevens;

17. Claim of Probert Manufacturing Company;

18. Stipulation as to Certain Facts re Order to Show Cause re American Surety Company of New York;

19. Opinion of Judge.

20. Order Affirming Referee re American Surety Company of New York;

21. Notice of Appeal;

22. Notice of Entry of Order;

23. Statement of Points; and

24. This Stipulation. [101]

Dated this 16th day of February, 1944.

MATHES & SHEPPARD
and
GORDON F. HAMPTON
Attorneys for American Surety Company of New York, a corporation, Appellant
MARTIN GENDEL and
NAT ROSIN
By MARTIN GENDEL
Attorneys for Paul W. Sampsell, Trustee in Bankruptcy, Appellee

[Endorsed]: Filed Feb. 25, 1944. [102]

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING ACTION IN CIRCUIT COURT OF APPEALS

Whereas, the appellant requires additional time for the preparation of the record on appeal, and it is desirable that the Clerk of the above named Court be given additional time for the preparation thereof; and

Whereas, the appellee desires to enter into certain correspondence with the Clerk of the Circuit Court of Appeals for the Ninth Circuit in connection with certain contemplated preliminary motions in said Circuit Court of Appeals;

It Is Hereby Stipulated between Paul W. Sampsell, trustee in bankruptcy and appellee in the above entitled cause, and American [103] Surety Company of New York, a corporation, appellant, through their respective attorneys thereunto duly authorized, that the time for filing the record on appeal and docketing the action herein in the Circuit Court of Appeals for the Ninth Circuit shall be and is hereby extended to March 31, 1944.

Dated this 6th day of March, 1944.

MARTIN GENDEL and
NAT ROSIN,
By MARTIN GENDEL
Attorneys for Paul W. Sampsell, Trustee in Bankruptcy, Appellee

MATHES & SHEPPARD
and
GORDON F. HAMPTON
Attorneys for American Surety Company of New York, a corporation, Appellant.

It is so Ordered this 6th day of March, 1944.

J. F. T. O'CONNOR
Judge

[Endorsed]: Filed Mar. 6, 1944. [104]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 104 inclusive contain full, true and correct copies of: Involuntary Bankruptcy Petition; Petition for Order Referring Proceedings to a Referee under the Provisions of Section 22a of the Bankruptcy Act; Order of General Reference; Order of Adjudication; Nunc Pro Tunc Order Correcting Decree; Subpena to Alleged Bankrupt; Summary of Debts and Assets; Statement of Affairs; Discharge of Bankrupt; Referee's Certificate on Review; Findings of Fact, Conclusions of Law and Order re American Surety Co.; Petition for Review of Referee's Order; Petition of Trustee for Order to Show Cause re American Surety Co.; Order to Show Cause re American Surety Co. of New York; Proofs of Claims of American Surety Company of New York, Jack Campbell and Tony A. Stevens, respectively; Proof of Claim of Probert Mfg. Co. Ltd.; Stipulation as to Certain Facts re Order to Show Cause re American Surety Company of New York; Opinion; Order Affirming Referee re American Surety Company of New York; Notice of Appeal; Notice of Entry of Order; Bond for Costs on Appeal; Statement of Points; Stipulation re Designation of Portions of Record to be Contained in Record on Appeal and Stipulation and Order Extending Time for Filing

Record on Appeal and Docketing Action in Circuit Court of Appeals which constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $24.90 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29 day of March, 1944.

[Seal] EDMUND L. SMITH,
Clerk
By THEODORE HOCKE
Deputy Clerk

[Endorsed]: No. 10721. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company of New York, a corporation, Appellant, vs. Paul W. Sampsell, as Trustee in Bankruptcy of the Estate of Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co., Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 30, 1944.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10721

In the Matter of

CHARLES B. STRATTON, doing business as TEMPLE CITY BUILDING CO., and STRATTON CONSTRUCTION CO.,

Bankrupt;

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Appellant.

CONCISE STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD NECESSARY FOR CONSIDERATION THEREOF AND TO BE PRINTED

For its concise statement of points on appeal on which the appellant intends to rely, the appellant adopts the Statement of Points filed with the Clerk of The District Court of the United States, Southern District of California, Central Division (original certified record on appeal, pp. 95-99, inclusive).

The appellant hereby designates the entire record on appeal certified by the Clerk of said District Court as necessary for the consideration of the appeal in this cause and to be printed. All filing stamps shall appear in the printed record, but the titles of the Court and the cause and the names

and addresses of attorneys appearing above the captions shall be omitted in printing.

Dated March 28th, 1944.

MATHES & SHEPPARD
and
GORDON F. HAMPTON
Attornyes for American Surety Company of New York, a Corporation, Appellant.

(Affidavit of Service by Mail.)

No. 10721

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Appellant,

vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy of the Estate of Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co.,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10721

AMERICAN SURETY COMPANY OF NEW YORK,

Appellant,

vs.

PAUL W. SAMPSELL, etc.,

Appellee.

MOTION TO DISMISS APPEAL

To the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the Appellee, Paul W. Sampsell, as Trustee in Bankruptcy of the Estate of Charles B. Stratton, and respectfully represents as follows:

I.

That on the 21st day of December, 1943, the Order Affirming the Referee in this matter was signed by Judge J. F. T. O'Connor, and the same was filed on said date and was duly entered in Civil Order Book 22, at page 464, under date of December 22, 1943, and said Order Affirming the Referee was docketed on December 23, 1943.

II.

That on the 23rd day of December, 1943, notice of entry of the Order was duly served on the Appellant herein.

III.

That on the 23rd day of December, 1943, the original order and the affidavit showing service on the appellant herein was duly filed with the Clerk of the Court by filing the same with the office of Ernest R. Utley, Referee in Bankruptcy, in charge of the within proceedings.

IV.

That the notice of appeal in the within action was filed on January 29, 1944, with the Office of the Clerk.

V.

That since the notice of appeal was filed more than thirty days after service of notice of the docketing of the order appealed from, which said notice was filed within five days from the date of service thereof, to wit, December 23, 1943, the said notice of appeal was filed beyond the authorized time and the within appeal should therefore be dismissed.

Wherefore, your appellee prays that this court make an order dismissing the appeal and allowing the costs incurred to date to the appellee.

Respectfully submitted,
MARTIN GENDEL and
NAT ROSIN,
By MARTIN GENDEL,
Attorneys for Appellee.

[Endorsed]: Filed April 24, 1944. Paul P. O'Brien, Clerk.

In the District Court of the United States, Southern District of California, Central Division

No. 39606—O'C—

In the Matter of

CHARLES R. STRATTON dba Temple City Building Co., and Stratton Construction Co., Bankrupt.

AFFIDAVIT OF H. H. SAMUELS

State of California,
County of Los Angeles—ss.

H. H. Samuels, being first duly sworn, deposes and states: That he is over the age of 21 years and for many years last past, has been the Clerk for the offices of Martin Gendel, Attorney at Law.

That on the 23rd day of December, 1943, he received an instruction in writing to file with the Clerk of the District Court the notice of Entry of Order in the above entitled case, dated December 23rd, 1943, the said order having been served on said date on the offices of Mathes & Sheppard, attorneys at law, at 458 South Spring Street, Los Angeles, California, in the manner indicated on the affidavit of services contained on the original notice of entry of Order which is a part of the record of this proceeding.

Your affiant does recall presenting the original notice of entry of order for filing with a Clerk of the District Court and actually stamping the written instructions of said Martin Gendel, with the stamp of Edmund L. Smith, as Deputy Clerk, bear-

ing the stamp of December 23rd, 1943; your affiant does not recall whether or not he left the notice of entry of order with the clerk and that thereafter whatever was done with the notice was done by the Clerk of the District Court, or whether the clerk informed him that since the order involved was an affirmation of the Referee that it should be filed with the offices of the Referee; at any rate, upon checking the file of the clerk's office, your affiant has discovered that the notice of entry of order was ultimately filed on the 23rd day of December, 1943 with the offices of the Honorable Ernest R. Utley, Referee in Bankruptcy.

Dated: this 17th day of February, 1944.

H. H. SAMUELS

Subscribed and sworn to before me this 17th day of February, 1944.

[Seal] [Illegible]

Notary Public in and for the above named County and State.

My Commission Expires June 19, 1945.

[Endorsed]: Filed April 21, 1944. Edmund L. Smith, Clerk. By E. M. Enstrom, Jr., Deputy Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10721

AMERICAN SURETY COMPANY OF NEW YORK,

Appellant,

vs.

PAUL W. SAMPSELL, etc.,

Appellee.

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the American Surety Company of New York does hereby acknowledge receipt of a copy of the affidavit of H. H. Samuels, which affidavit is dated February 17, 1944, and that this stipulation shall constitute proof of service thereof.

Dated this 17th day of April, 1944.

MARTIN GENDEL,
Attorney for Appellee
MATHES & SHEPPARD,
By GORDON HAMPTON,
Attorneys for Appellant

[Endorsed]: Filed April 22, 1944. Edmund L. Smith, Clerk. By E. M. Enstrom, Jr., Deputy Clerk.

District Court of the United States, Southern District of California, Central Division

United States of America,
Southern District of California—ss.

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of Affidavit of H. H. Samuels and Stipulation filed April 21, 1944 and April 22, 1944 respectively in the Matter of Charles R. Stratton, etc., Bankrupt, No. 39606—O'C—In Bankruptcy, as the same appears from the original record remaining in my office.

Witness my hand and the seal of said Court, this 24th day of April, A. D. 1944.

[Seal] EDMUND L. SMITH
Clerk,
By THEODORE HOCKE
Deputy Clerk

[Endorsed]: Filed April 26, 1944. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, June 12, 1944.

Before: Garrecht, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER SUBMITTING MOTION TO DISMISS

Pursuant to stipulation of counsel for the respective parties, It Is Ordered that the motion of appellee to dismiss appeal be, and hereby is submitted for consideration and decision on briefs on file.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, June 13, 1944.

Before: Garrecht, Mathews and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DENYING MOTION TO DISMISS

Upon consideration thereof, and by direction of the Court, It Is Ordered that the motion of appellee to dismiss appeal, heretofore submitted be, and hereby is denied.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, March 13, 1945.

Before: Mathews, Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Gordon F. Hampton, counsel for appellant, and by Mr. Martin Gendel, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, April 24, 1945.

Before: Mathews, Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE

By direction of the Court, Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: Mathews, Stephens and Healy, Circuit Judges.

Mathews, Circuit Judge.

OPINION

On January 2, 1941, Charles B. Stratton contracted with General Electric Company to make certain alterations in that company's factory building at Ontario, California. On January 3, 1941, Stratton and appellant, American Surety Company of New York, executed a bond reading as follows:

"Know All Men by These Presents: That We, C. B. Stratton, doing business as the Stratton Construction Company as principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and duly authorized to transaction business under the laws of the State of California, as Surety, are held and firmly bound unto any and all persons, furnishing materials used in, upon, for or about the performance of the work contracted to be executed or performed under the contract hereinafter mentioned, and all persons who performed work or labor upon the same, and all persons who supply both work and materials, and whose claim has not been paid by the contractor, company, or corporation, in the just and full sum of Thirty-

Three Thousand Nine Hundred Fifty and No/100 ($33,950.00) Dollars, for the payment whereof well and truly to be made, said Principal and Surety bind themselves, their heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

"The Condition of the Foregoing Obligation Is Such, That Whereas the above bounden Principal has entered into contract, dated January 2, 1941, with General Electric Company to do and perform the following work, to-wit: doing all alterations to factory building for the General Electric Company, Ontario, California,

"Now, Therefore, if the above bounden Principal shall pay or cause to be paid in full the claims of all persons performing labor upon or furnishing materials to be used in doing the work described in said contract or in any modification thereof, then this obligation shall be void; otherwise to remain in full force and effect. This bond shall inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in said work, giving to such persons a right of action to recover hereon in any suit brought to foreclose mechanics liens arising under said contract or in a separate suit brought upon this bond in an amount not exceeding, however, in the aggregate of all recoveries, the amount of the bond as above specified.

"No suit or action on this bond to recover for labor performed or material furnished in respect to work herein referred to shall be sustained unless the same be commenced within the period provided by law after the claimant filed his claim of lien, or

if he files no such claim of lien, unless the suit or action be commenced within six months after the contractor finally ceases operations on the work described in said contract."

The work described in the contract was completed on or about September 10, 1941. Stratton did not pay or cause to be paid the claims of all persons performing labor upon or furnishing materials used in doing the work described in the contract. Five such claims, aggregating $6,724.78, were not paid by Stratton, but were paid by appellant. Three such claims, aggregating $1,336.11, were not paid at all. The three unpaid claims were those of Jack Campbell, Probert Manufacturing Company, hereafter called Probert, and Tony Stevens, for $805.10, $385 and $146.01, respectively.

On November 27, 1941, Stratton was adjudged a bankrupt. Appellee, Paul W. Sampsell, was appointed trustee. Appellant filed with the referee in bankruptcy proof of a claim for $6,987.48, asserting that it had executed the above mentioned bond as Stratton's surety upon his application and agreement to indemnify and save appellant harmless against all claims and expenses resulting therefrom, and that, as such surety, it had paid five claims, aggregating $6,724.78, as stated above, plus expenses amounting to $262.70—a total of $6,987.48. Appellant's claim was allowed. Campbell, Probert and Stevens filed with the referee proofs of their claims, aggregating $1,336.11. These were allowed, as were the claims of numerous other creditors.

Appellee, as trustee, petitioned for and obtained

from the referee an order directing that no dividend be paid on appellant's claim unless and until the claims of Campbell, Probert and Stevens were paid in full; that "such amount of the dividend otherwise payable on the claim of [appellant] as may be required when divided prorata amongst the named three creditors, shall be applied on their claims, in addition to their ordinary dividend until their claims have been paid in full or the dividends otherwise payable to [appellant] have been exhausted;" and that, "after the said three creditors have been paid in full, then the balance remaining of the dividend otherwise payable to [appellant], if any, shall be paid to [appellant]." From a judgment[1] affirming the referee's order this appeal is prosecuted.

The order was correct; for, having obligated itself, as Stratton's surety, to pay the claims of all persons performing labor upon or furnishing materials used in doing the work described in the contract, having paid the claims of five and having failed to pay the claims of three such persons (Campbell, Probert and Stevens), appellant was not entitled to share in the assets of Stratton's bankrupt estate until the claims of Campbell, Probert and Stevens were paid in full.[2]

In its brief filed here, appellant states that it

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[1] In re Stratton, D.C.S.D.Cal., 53 F. Supp. 131.

[2] United States v. National Surety Co., 254 U.S. 73; Jenkins v. National Surety Co., 277 U.S. 258; American Surety Co. v. Westinghouse Electric Mfg. Co., 296 U.S. 133; Prudence Realization Corp. v. Geist, 316 U.S. 89.

"has paid in full all the bankrupt's creditors whose claims are covered by the bond." The statement is incorrect. The claims of Campbell, Probert and Stevens are covered by the bond and have not been paid.

Appellant cites the fourth paragraph of the bond, limiting the time within which actions might be brought thereon, and cites § 1183 of the California Code of Civil Procedure, limiting the time within which actions may be brought on bonds provided for in that section. These limitations have no relevancy here, for this is not an action on a bond, but is a bankruptcy proceeding. In this proceeding, the bankruptcy court was required to, and did, determine the relative rights of creditors—Campbell, Probert, Stevens, appellant and others—in the distribution of the bankrupt's estate. That determination was governed by Federal law, not State law.[3] We therefore have no occasion to consider the State court decisions[4] cited by appellant.

Judgment affirmed.

[Endorsed]: Opinion. Filed Apr. 24, 1945. Paul P. O'Brien, Clerk.

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[3] Prudence Realization Corp. v. Geist, Supra.

[4] Kleinclaus v. Dutard, 147 Cal. 245; A. L. Young Machinery Co. v. Cupps, 213 Cal. 210; Republic Iron & Steel Co. v. Patillo, 19 Cal. App. 316; Smith v. McKnight, 117 Cal. App. 427; Carpenter v. National Surety Co., 25 Cal. App. 2d 90.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10721

AMERICAN SURETY COMPANY OF NEW YORK,

Appellant,

vs.

PAUL W. SAMPSELL, as Trustee, etc.,

Appellee.

DECREE

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment decree of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellant.

It Is Further Ordered, Adjudged, and Decreed by this Court, that the appellee recover against the appellant for his costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered April 24, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred thirty-one (131) pages, numbered from and including 1 to and including 131, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 17th day of May, 1945.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.

JUN 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 142

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Petitioner,

vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy of the Estate of Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co. and Stratton Construction Co.,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, and Brief in Support Thereof.

WILLIAM C. MATHES,
458 South Spring Street, Los Angeles, California,
Counsel for Petitioner.

MATHES & SHEPPARD and
GORDON E. HAMPTON,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.....

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Petitioner,

vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy of the Estate of Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, American Surety Company of New York, prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Ninth Circuit determining that the dividends on petitioner's allowed general claim in bankruptcy are to be paid to certain other general creditors of the bankrupt to whom petitioner is not and has never been indebted.

Opinions Below.

The opinion of the Circuit Court of Appeals [R. 126] is not yet reported. The opinion of the District Court [R. 93] is reported at 53 F. Supp. 131, *sub nom. In re Stratton.*

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on April 24, 1945 [R. 131]. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938; 28 U. S. C. A. §347(a); and under Section 24(c) of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 553; as amended by the Act of June 22, 1938, c. 575, §1, 52 Stat. 854; 11 U. S. C. A. Supp. §47(c).

Questions Presented.

1. In a case involving the rights of parties under a bond executed pursuant to state statute where the provisions of the statute are a part of the bond, does not the refusal of a bankruptcy court to consider such state statute and relevant state court decisions constitute a determination of the controversy without appropriate regard for rights acquired under rules of state law?

2. In a bankruptcy proceeding where a dispute arises between claimants, should not a federal court give effect to state law governing their substantive rights?

3. May dividends declared on a surety's allowed claim in bankruptcy properly be paid to certain other creditors of the bankrupt to whom the surety is not and has never been indebted?

4. Is there any equitable basis—either under federal law or state law—for depriving a surety of the usual

bankruptcy rule of equality of distribution where the surety's claim is for subrogation after full payment of all creditors under a statutory bond in a case where certain potential creditors of the surety were not paid solely because of their own lack of diligence in failing to take the steps required by state statute to become actual creditors under the bond?

Statutes Involved.

1. Section 65(a) of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 563; as amended by the Act of June 22, 1938, c. 575, §1, 52 Stat. 875; 11 U. S. C. A. Supp. §105(a):

> "Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured."

2. Section 1183 of the Code of Civil Procedure of California (1872), as amended by Cal. Stats. (1929) pp. 1924, 1926-27:

> ". . . In case the surety or sureties on any bond given as in this chapter provided shall have caused said bond to be filed and recorded in the office of the county recorder of the county in which the property is situated, before the work of improvement is completed, then no action may be maintained thereon unless there shall previously have either been filed a mechanic's lien claim as in this chapter provided or unless written notice shall previously have been given to the surety on said bond before the expiration of the time prescribed in this chapter for filing a lien to enforce such claim. . . . ."

The provisions of said Section 1183 of the Code of Civil Procedure of California are set forth in their entirety in the appendix, *infra*.

Statement.

The facts in the case at bar are stipulated and undisputed. [R. 85-92.]

On January 2, 1941, Charles B. Stratton, the bankrupt here, contracted with General Electric Company to make certain alterations in that company's factory building at Ontario, San Bernardino County, California. [R. 87.]

On January 3, 1941, Stratton applied to petitioner, American Surety Company of New York, for a statutory laborers' and materialmen's bond [R. 58-67, 85-86]. In his application Stratton agreed to indemnify the surety [R. 63-66]. The same day, Stratton as principal, and petitioner as surety, executed a bond entitled "Laborers & Materialmen, Statutory Form for California" in the penal sum of $33,950 [R. 86-88]. This bond is set forth in full in the record [R. 86-88] and in the opinion of the Circuit Court of Appeals [R. 126-128].

On January 7, 1941, the plans and specifications, the construction contract and the bond were filed and recorded in the office of the Recorder of San Bernardino County pursuant to Section 1183 of the California Code of Civil Procedure [R. 88]. Under California law referred to hereafter, the provisions of that statute—Section 1183—became a part of the bond as if incorporated in *haec verba*.

Thereafter, Stratton, as original contractor, set about to effect the construction work required by the contract, and on September 10, 1941, a notice of completion was recorded. It is stipulated that on October 10, 1941, under state law (§1187 California Code of Civil Procedure), the time expired for laborers and materialmen to file and

record "mechanic's lien" claims or to give notice to the surety [R. 89].

Five laborers and materialmen filed and recorded claims of lien or lodged timely written notices with the surety setting forth the furnishing of labor and materials, as required by Section 1183 of the California Code of Civil Procedure [R. 89-90].

The surety thereupon paid in full each claim of these five laborers and materialmen who so recorded claims of lien or lodged notices as required by Section 1183 of the California Code of Civil Procedure, as follows:

Soule Steel Company	$4,767.09
Emil Brown & Company	1,498.42
Harold Shugat Company	265.78
Valley Window Cleaners	126.85
Shattuck Lumber Company	66.64
	$6,724.78

[R. 90-91.]

On November 27, 1941, Stratton was adjudged a bankrupt and Paul W. Sampsell, respondent here, was appointed trustee [R. 11]. Thereafter, American Surety Company filed with the referee in bankruptcy its proof of claim for $6,987.48 based upon the indemnity agreement of Stratton and upon subrogation, for the surety had paid the aforesaid five claims aggregating $6,724.78 and had incurred expenses of $262.70—a total of $6,987.48 [R. 29, 54-57]. The surety's claim for $6,987.48 was allowed as a general claim [R. 30].

Among the other general claims filed there appeared the proofs of claims of Jack Campbell for $805.10, Probert Manufacturing Company for $385 and Tony

Stevens for $146.01—a total of $1,336.11, based upon labor and materials claimed to have been furnished to Stratton in connection with the General Electric Company contract [R. 36, 91-92]. *None* of these three claimants ever recorded any claim of lien or gave any notice whatsoever to the surety, as required by Section 1183 of the California Code of Civil Procedure [R. 91].

It is stipulated that, in addition to the three last mentioned claimants, there are two other persons who furnished labor and materials on Stratton's contract and who remain unpaid in the total sum of $259.13. These two persons likewise failed to record any mechanic's lien or give any notice to the surety as required by the statute. In addition, no proof of claim in bankruptcy was ever filed on behalf of these two [R. 91-92]; nor is any reference to these two parties found in the decision of the court below.

In the course of the bankruptcy proceedings the claims of Jack Campbell, Probert Manufacturing Company and Tony Stevens—the three parties above mentioned who neglected to record any claim of lien or to give any notice to the surety—were regularly allowed as general claims in bankruptcy [R. 35-37].

It is also stipulated that there are numerous other general unsecured claims against the estate of the bankrupt other than those directly involved in the case at bar [R. 36, 92].

The trustee in bankruptcy, respondent Sampsell, petitioned for [R. 48-52] and obtained from the referee on June 15, 1943, the following order:

> ". . . said Trustee . . . is directed not to pay any dividend on the general claim of American

Surety Company of New York in the sum of $6,987.48 unless and until the claims of Jack Campbell, in the sum of $805.10, Probert Manufacturing Company in the sum of $385.00 and Tony Stevens in the sum of $146.01 have been paid in full, and such amount of the dividend otherwise payable on the claim of the American Surety Co. of New York as may be required when divided pro rata amongst the named three creditors, shall be applied on their claims, in addition to their ordinary dividend until their claims have been paid in full or the dividends otherwise payable to the American Surety Company of New York, have been exhausted: after the said three creditors have been paid in full, then the balance remaining of the dividends otherwise payable to the American Surety Company of New York, if any, shall be paid to said surety company" [R. 38].

It is conceded that under this order petitioner will receive nothing on its allowed claim.

From a judgment of the District Court affirming the referee's order, petitioner appealed [R. 98-100]. The Circuit Court of Appeals affirmed the judgment of the District Court [R. 131], and petitioner now seeks review by certiorari.

Reasons for Granting the Writ.

1. This cause involves questions of far-reaching importance in the administration of justice on the "equity side" by courts of bankruptcy throughout the nation, necessitating an authoritative determination by this Court.

2. The decision of the Circuit Court of Appeals, refusing to consider or give any effect to rights acquired

under a state statute[1] and state decisions[2] in a controversy between certain claimants in bankruptcy, is in conflict with the applicable decisions of this Court.

That decision [R. 130] conflicts with the decisions of this Court holding that a court of bankruptcy may not make its determination in such case "without appropriate regard for rights acquired under rules of state law."

Prudence Realization Corp. v. Geist, 316 U. S. 89, 95, 62 S. Ct. 978, 86 L. ed. 1293, 1298 (1942);

Prudence Realization Corp. v. Ferris, 323 U. S. 650, 89 L. ed. (Adv. Ops.) 456, 458 (1945).

3. The decision of the Circuit Court of Appeals conflicts with the fundamental bankruptcy rule that contractual rights established by state law will be recognized and considered, where the sweep of the Bankruptcy Act does not require a contrary determination. This was true even before *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188 (1938).

Corn Exchange National Bank & Trust Co. v. Klauder, 318 U. S. 434, 437, 63 S. Ct. 679, 87 L. ed. 884, 886, note 8 (1943);

Holt v. Crucible Steel Co., 224 U. S. 262, 265, 32 S. Ct. 414, 56 L. ed. 756, 757 (1912).

And, as here, where the federal court is governed by the rules of equity, due regard must be accorded the state law concerning the substantive rights between the parties.

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[1]§1183 of The Code of Civil Procedure of California (1872), as amended by Cal. Stats. (1929) pp. 1924, 1926-27.

[2]Carpenter v. National Surety Co., 25 Cal. App. (2d) 90, 93, 76 P. (2d) 523 (1938); A. L. Young Machinery Co. v. Cupps, 213 Cal. 210, 219, 2 P. (2d) 321 (1931); Republic Iron & Steel Co. v. Patillo, 19 Cal. App. 316, 318-319, 125 P. 923 (1912); Smith v. McKnight, 117 Cal. App. 427, 428, 4 P. (2d) 305 (1931); Kleinclaus v. Dutard, 147 Cal. 245, 249, 81 P. 516 (1905).

See:

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 S. Ct. 860, 82 L. ed. 1290 (1938).

4. The decision of the Circuit Court of Appeals, ordering the dividends on petitioner's allowed claim in bankruptcy to be paid to certain other creditors of the bankrupt to whom petitioner never has been indebted, is in conflict with the applicable decisions of this Court.

Having paid in full all persons who became creditors on the statutory bond, petitioner is entitled under the settled rule of this Court to subrogation against the insolvent debtor; and the judgment of the court below is therefore in conflict with the following decisions.

American Surety Co. v. Westinghouse Electric Mfg. Co., 296 U. S. 133, 137, 56 S. Ct. 9, 80 L. ed. 105, 109 (1935);

Jenkins v. National Surety Co., 277 U. S. 258, 266, 48 S. Ct. 445, 72 L. ed. 874, 876 (1928);

United States v. National Surety Co., 254 U. S. 73, 76, 41 S. Ct. 29, 65 L. ed. 143, 144-145 (1920).

5. The decision of the Circuit Court of Appeals, depriving petitioner of the usual bankruptcy rule of equality of distribution by ordering the dividends on petitioner's allowed claim to be paid to three non-diligent parties, is in conflict with the applicable decisions of this Court.

The claims of petitioner and of said three claimants stand on the same plane as to the assets of the bankrupt. The purpose of Section 65(a) of the Bankruptcy Act, to bring about a ratable distribution among all general claimants, has been violated in the proceeding at bar.

Young v. Higbee Co., ... U. S. ..., 89 L. ed. (Adv. Ops.) 578 (No. 342, Oct. Term, 1944—Feb. 26, 1945).

6. The decision of the Circuit Court of Appeals is contrary to the basic equitable principle observed in all federal courts that equity aids the diligent and not those who sleep upon their rights. No equities in favor of the three claimants ever arose from the suretyship, for they failed to take the statutory steps required to become obligees on the bond.

7. The decision of the Circuit Court of Appeals for the Ninth Circuit, awarding the dividends payable to petitioner to three parties who made no attempt to qualify as creditors under the statutory bond, is directly in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Moise v. Scheibel,* 245 Fed. 546 (1917), where the terms of the bankruptcy order there reversed were almost identical with that at bar.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the judgment of the Circuit Court of Appeals for the Ninth Circuit.

June, 1945.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Petitioner,

By WILLIAM C. MATHES,

Counsel for Petitioner.

MATHES & SHEPPARD and
GORDON F. HAMPTON,

Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No.....

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Petitioner,

vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy of the Estate of Charles B. Stratton, doing business under the fictitious firm names and styles of Temple City Building Materials Co., and Stratton Construction Co.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

Opinions Below.

The opinion of the Circuit Court of Appeals [R. 126] is not yet reported. The opinion of the District Court [R. 93] is reported at 53 F. Supp. 131, *sub nom. In re Stratton.*

Jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked are stated in the petition at page 2.

Statement of the Case.

The facts appear in the petition at pages 4 to 7, and in the interest of brevity are not repeated herein.

However, a brief reference to the nature of the controversy and the parties involved is pertinent in presenting the major federal issues raised in the case at bar.

Petitioner is the holder of an allowed general claim in bankruptcy based upon subrogation[3] to the rights of five of the bankrupt's creditors fully paid by petitioner as the surety upon the bond furnished pursuant to California statute[4] [R. 29-30, 54-57].

Reduced to its terms, this is a controversy between claimants—that is, between petitioner and three other general bankruptcy claimants represented by respondent trustee. The disposition of the dividends payable on petitioner's claim is at issue. The three claimants are asserting right to such dividends and therefore urging a departure from the fundamental policy of the Bankruptcy Act expressed in Section 65(a) as follows:

> "Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured." (11 U. S. C. A. Supp. §105(a).)

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[3] In the interests of brevity the reference throughout is to subrogation; however, petitioner also asserts the related right of indemnity based upon contractual agreement with the bankrupt [R. 63-67].

[4] §1183 of the California Code of Civil Procedure.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In determining this controversy "without appropriate regard for rights acquired under rules of state law"[5] through its refusal to recognize the California statute[6] and decisions[7] establishing the fact that on its surety bond petitioner has never been liable to certain other claimants to the bankrupt estate in whose favor petitioner's claim is subordinated by its decision [R. 130].

2. In failing to give any effect to state law governing the substantive rights of claimants where a dispute arises between them in a bankruptcy proceeding [R. 130].

3. In ordering the dividends on petitioner's allowed claim in bankruptcy to be paid to certain other creditors of the bankrupt to whom petitioner is not and has never been indebted [R. 128-129].

4. In depriving the surety, contrary to equitable principles, of the usual bankruptcy rule of equality of dis-

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[5]Prudence Realization Corp. v. Geist, 316 U. S. 89, 95, 62 S. Ct. 978, 86 L. ed. 1293, 1298-99 (1942);

Prudence Realization Corp. v. Ferris, 323 U. S. 650, 89 L. ed. (Adv. Ops.) 456, 458 (1945);

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 S. Ct. 860 82 L. ed. 1290 (1938).

[6]§1183 of the Code of Civil Procedure of California (1872), as amended by Cal. Stats. (1929), pp. 1924, 1926-27.

[7]Carpenter v. National Surety Co., 25 Cal. App. (2d) 90, 93, 76 P. (2d) 523 (1938); A. L. Young Machinery Co. v. Cupps, 213 Cal. 210, 219, 2 P. (2d) 321 (1931); Republic Iron & steel Co. v. Patillo, 19 Cal. App. 316, 318-319, 125 P. 923 (1912); Smith v. McKnight, 117 Cal. App. 427, 428, 4 P. (2d) 305 (1931); Kleinclaus v. Dutard, 147 Cal. 245, 249, 81 P. 516 (1905).

tribution (§65(a), Bankruptcy Act) where the surety's claim is for subrogation after full payment of all creditors under the statutory bond in this case where certain potential creditors of the surety were not paid solely because of their own lack of diligence in failing to take the steps required by state statute to become actual creditors under the bond [R. 129-130].

Summary of Argument

1. Federal regard for substantive rights established by state law is required in the case at bar.

2. The Ninth Circuit specifically refused to consider rights acquired under state law.

3. Petitioner is not and has never been liable to the three claimants represented by respondent.

4. Petitioner has been deprived of its dividends contrary to established equitable principles, both federal and state.

(a) Equity will not aid the three non-diligent claimants.

(b) It is inequitable to deprive the subrogated surety of its dividends.

5. The decision of the Ninth Circuit in denying the equality of distribution required by the Bankruptcy Act conflicts with the decision of the Eighth Circuit in *Moise v. Scheibel.*

ARGUMENT.

1. Federal Regard for Substantive Rights Established by State Law Is Required in the Case at Bar.

It is part of federal law itself that appropriate recognition in bankruptcy is to be accorded substantive rights acquired under state law.

> *Prudence Realization Corp v. Geist*, 316 U. S. 89, 95, 62 S. Ct. 978, 86 L. ed. 1293, 1298-99 (1942);
>
> *Prudence Realization Corp. v. Ferris*, 323 U. S. 650, 89 L. ed. (Adv. Ops.) 456, 458 (1945).

The court below erroneously assumed that it was proper to exclude from consideration the interplay of state and federal law in this cause. This is a dangerous misconception, for, as this Court stated in *Prudence Realization Corp. v. Geist*, 316 U. S. 89, 95, 62 S. Ct. 978, 86 L. ed. 1293, 1298-99 (1942):

> "The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed, . . . and it is for that court —*not without appropriate regard for rights acquired under rules of state law*—to define and apply federal law in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class." (Italics added.)

Thus the federal bankruptcy law looks to state law as a fact or circumstance of high importance in determining the status of petitioner's claim. The instrument upon

which all parties here base their asserted rights was a bond intertwined with a state statute and state decisions. Thus in order to do equity in the case at bar the bankruptcy court must necessarily give effect to the state law.

See:

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 S. Ct. 860, 82 L. ed. 1290 (1938).

Just as the courts have looked to rules of state law in determining the time when a preference is perfected under the Bankruptcy Act, so, here, it is essential to look to the state law which fixed the relationship of the parties prior to bankruptcy.

See:

Corn Exchange National Bank & Trust Co. v. Klauder, 318 U. S. 434, 437, 63 S. Ct. 679, 87 L. ed. 884, 886, note 8 (1943).

It is submitted that the decision of the Circuit Court of Appeals is in conflict with the foregoing applicable decisions of this Court.

2. The Ninth Circuit Specifically Refused to Consider Rights Acquired Under State Law.

Despite the fact that the substantive rights involved here are grounded solely upon a statutory bond the provisions of which cannot be determined without due consideration for a state statute and state decisions, the Circuit Court of Appeals refused to give effect to such statute or such decisions [R. 130].

In the opinion below it is stated that here the "determination was governed by Federal law, not State law," and that "We therefore have no occasion to consider the State court decisions cited by appellant" [R. 130]. But these bare statements do not solve the questions at bar. On the contrary, under the applicable decisions of this Court—that is to say, under the federal law itself—a court of bankruptcy in this cause must not act without appropriate regard for state law, since the foundation of this controversy will be shown to rest upon a bond which embodies the provisions of a state statute.

3. Petitioner Is Not and Has Never Been Liable to the Three Claimants Represented by Respondent

In *Carpenter v. National Surety Co.*, 25 Cal. App. (2d) 90, 93, 76 P. (2d) 523 (1938), the court said:

> "The bond is a statutory bond authorized by Section 1183 of the Code of Civil Procedure. As such the terms of the statute are read into the bond and control its interpretation and effect."

Under the terms of Section 1183 of the California Code of Civil Procedure, set forth in the appendix, *infra*, petitioner did not assume any liability whatsoever to any materialman or laborer "unless there shall previously have either been filed a mechanic's lien claim . . . or unless written notice shall previously have been given to the surety before the expiration of the time prescribed . . . for filing a lien to enforce such claim . . ."

It is stipulated that five diligent materialmen and laborers filed mechanic's lien claims or gave notice to petitioner and were paid in full [R. 90-91]. It is also stipulated that five other materialmen and laborers neither filed mechanic's lien claims nor gave any notice whatsoever to petitioner as surety. As stated, three of the latter parties are represented here by respondent and two of them did not file claims in bankruptcy [R. 91-92].

Under the California decisions it is clear that the filing of a lien, or the giving of digect notice, was indispensable to charging petitioner with liability on its bond.

A. L. Young Machinery Co. v. Cupps, 213 Cal. 210, 219, 2 P. (2d) 321 (1931);

Republic Iron & Steel Co. v. Patillo, 19 Cal. App. 316, 318-319, 125 P. 923 (1912);

Smith v. McKnight, 117 Cal. App. 427, 428, 4 P. (2d) 305 (1931).

Thus as pointed out in the concurring opinion in *Eberhart v. United States*, 204 Fed. 884, 891 (C. C. A. 8th, 1913):

> "Because the conditions on which alone" the sureties "had agreed to be liable to any laborer or materialman . . . had never arisen" the sureties "were as free of liability to them as . . . if they had never signed the bond, and they remain so unto this day."

It is, therefore, beyond dispute that petitioner never at any time became indebted to the three claimants represented by respondent.

4. **Petitioner Has Been Deprived of Its Dividends Contrary to Established Equitable Principles, Both Federal and State.**

(a) EQUITY WILL NOT AID THE THREE NON-DILIGENT CLAIMANTS.

Regardless of whether federal law or state law is determinative of the case at bar, both jurisdictions observe the same governing principles of equity. Thus it is a fundamental and "familiar principle that equity favors the diligent, and not those who slumber on their rights."

Williams v. Banana Distributing Co., 59 F. (2d) 645 (C. C. A. 6th, 1932).

See, also:

Hammond v. Hopkins, 143 U. S. 224, 250, 12 S. Ct. 418, 36 L. ed. 134, 145 (1892);

Kleinclaus v. Dutard, 147 Cal. 245, 249, 81 P. 516 (1905).

Not only is there a state statute—Section 1183 of the California Code of Civil Procedure—governing the question of lack of diligence on the part of the three claimants represented here by respondent, but that statute is part and parcel of the surety bond furnished by petitioner. (*Carpenter v. National Surety Co., supra*, 25 Cal. App. (2d) 90, 93, 76 P. (2d) 523 (1938).)

The filing of claims in bankruptcy by the three claimants was sufficient to enable them to share ratably in the general assets of the estate but certainly does not entitle them to receive the dividends on petitioner's claim as a windfall in addition to their own dividends, as the order affirmed by the Circuit Court of Appeals would permit.

It is submitted that it was grossly inequitable for the bankruptcy court to subject petitioner's dividends to what amounts to an equitable execution in favor of the three claimants. These three claimants were nothing more than bare general claimants in bankruptcy. At one time they had been potential creditors on petitioner's statutory bond. But they made no attempt to qualify as actual creditors by filing the necessary notice or claim of lien as required by the statute. Therefore, prior to bankruptcy they had waived all protection of the bond.

The provisions of that statute—Section 1183 of the California Code of Civil Procedure—are substantive, not technical requirements. They have a purpose cognizable in equity. For as the court under parallel circumstances said in *Republic Iron & Steel Co. v. Patillo, supra,* 19 Cal. App. 316, 318-319, 125 P. 923 (1912):

> ". . . we then find a failure on the part of . . . the court to find, that plaintiff had filed any verified statement . . . setting forth the amount of its claim within thirty days from the time the improvement was completed . . . It cannot be said that a compliance with the statutory requirement in this regard would prove of no benefit to the sureties, and that, therefore, it may be disregarded . . . the filing of the verified claim . . . showing that the bounden principal has failed to pay for materials, furnishes a means of notice to such sureties and by timely action they may be able to protect themselves, where, without such notice their remedy might be lost."

See, also:

A. L. Young Machinery Co. v. Cupps, supra, 213 Cal. 210, 219, 2 P. (2d) 321 (1931).

The cases last cited are two of the state court decisions which the Circuit Court of Appeals had "no occasion to consider" [R. 130].

The provisions of Section 1183 of the California Code of Civil Procedure are, therefore, indispensably precedent to obligation. Being substantive in purpose, those provisions constitute an enactment into statute declaring the policy of the law which regulated the conduct of the parties.

Thus the three claimants never became anything more than *potential* creditors of petitioner. The language of *In re L. & R. Wister & Co.*, 237 Fed. 793, 795 (C. C. A. 3rd, 1916), is pertinent:

> ". . . it is going rather far to hold, that a court of bankruptcy, in its orderly administration of justice, will reach into its general equity powers and find a means to restore to a 'person a right which is conferred upon him by statute and *which he lost by his own neglect.*'." (Italics added.)

It seems clear, then, as stated in *Estate of Houston*, 205 Cal. 276, 283, 270 P. 939 (1928), that each of the five non-diligent parties, including the three at bar, "alone is at fault in having negligently allowed his rights to sleep, and hence equity will not come to his aid." And this is equally true whether the court of equity be federal or state. It is *solely* because of their own neglect that the three claimants were not paid.

(b) It Is Inequitable to Deprive the Subrogated Surety of Its Dividends.

The judgment of the Circuit Court of Appeals directly conflicts with a rule well settled by the decisions of this Court. Petitioner's case *meets* the test of this rule that "the surety may not claim subrogation against an insolvent debtor until the creditor is paid in full. . . ."

Jenkins v. National Surety Co., 277 U. S. 258, 266, 48 S. Ct. 445, 72 L. ed. 874, 876 (1928).

See:

United States v. National Surety Co., 254 U. S. 73, 76, 41 S. Ct. 29, 65 L. ed. 143, 144-145 (1920);

Since the terms of Section 1183 of the California Code of Civil Procedure are part of this statutory bond, petitioner became obligated *only* to those materialmen and laborers who made themselves known to petitioner by filing mechanic's liens or giving notice. (*Carpenter v. National Surety Co., supra*, 25 Cal. App. (2d) 90, 93, 76 P. (2d) 523 (1938); *Republic Iron & Steel Co. v. Patillo, supra*, 19 Cal. App. 316, 318-319, 125 P. 923 (1912).)

The case of *American Surety Co. v. Westinghouse Electric Mfg. Co.*, 296 U. S. 133, 56 S. Ct. 9, 80 L. ed. 105 (1935), which the court below purports to follow, fully supports petitioner's position. In the *Westinghouse* case there was no statute such as Section 1183 of the Code of Civil Procedure. Accordingly, in that case all materialmen and laborers became creditors of the surety. There was no question of diligence. The surety there became indebted to *each* claimant, but did *not* pay in full those to whom it was obligated. There the surety paid

the penal sum of the bond to creditors, but this was not sufficient to go around. Thus, each materialman and laborer in the *Westinghouse* case *was a creditor* of the surety but only *partially* paid. The essential difference between that case and this is that here the surety never became indebted to the three claimants who by the order of the court below are to receive the dividends on petitioner's claim.

The Court stated that the surety

> "may not share in the assets of the principal by reason of such payment until the debts thus partially protected have been satisfied in full. . . . 'A surety liable only for part of the debt does not become subrogated . . . unless he pays the whole debt or it is otherwise satisfied.'"
>
> *American Surety Co. v. Westinghouse Electric Mfg. Co.*, 296 U. S. 133, 137, 56 S. Ct. 9, 80 L. ed. 105, 109 (1935).

But in the case at bar petitioner specifically complied with the rule. Here, at all times the surety stood ready, able and willing to pay in full all claims of those who came forward against the bond. Here, the surety did in fact pay in full all those to whom it became obligated. The case at bar is not a case, as was the *Westinghouse* case, where the face of the bond was not sufficiently ample and where the surety sought to compete with those whose claims it had paid only in part. Here, petitioner undertook to pay in full and did pay in full. Thus, there is nothing in the case at bar to prevent the subrogation or indemnification of petitioner.

There is another significant difference between the *Westinghouse* case and this. In that case the surety was attempting to compete with other diligent claimants to

whom it had not only been indebted but with respect to a particular fund or retained percentage which had been set up especially for their benefit. Thus there were strong equities favoring the claim of the creditors to that fund. The Court said that the creditors involved had "a right or an interest" against this retained percentage "which, even if not a lien in the strict and proper sense, brought kindred consequences along with it." (296 U. S. at 136, 80 L. ed. at 109.)

The succinct statement of this Court in the *Westinghouse* case is, therefore, especially pertinent:

> "Slight differences in facts may cause the equities to vary, and thus vary the result. * * * Our decision must be kept within the bounds of the controversy before us." (296 U. S. 133, 139, 56 S. Ct. 9, 80 L. ed. 105, 110, 111.)

The effect of the decision of the Circuit Court of Appeals in the proceeding at bar is well summed up in the words of *In re Kansas City Journal-Post Co.*, 144 F. (2d), 791, 800-801 (C. C. A. 8th, 1944):

> "While a bankruptcy proceeding, of course, 'is not itself a suit in equity', . . . the court essentially, in dealing with creditors' claims, 'sits as a court of equity', . . . but 'not without appropriate regard for rights acquired under rules of state law', . . .
>
> * * * * * * * *
>
> "But since bankruptcy, as we have suggested, is a final liquidation, the power of subordination necessarily must be measuredly and not blankly exercised. It must have a sound regard for the distribution results that will be produced to the creditor whose claim is being subordinated, as well as to the other creditors. It should not operate to take away anything punitively to which one creditor is justly entitled in view

> of the liquidation finality, and bestow it upon others, who in the relative situation have no fair right to it. . . ."

It is submitted that, in the case at bar, contrary to the applicable decisions of this Court, the power of subordination has been inequitably and "blankly exercised".

5. The Decision of the Ninth Circuit in Denying the Equality of Distribution Required by the Bankruptcy Act Conflicts With the Decision of the Eighth Circuit in Moise v. Scheibel.

In *Moise v. Scheibel*, 245 Fed. 546, 547 (C. C. A. 8th, 1917), the District Court had, among other things, ordered:

> ". . . that Moise should receive dividends upon his claim equally with all other creditors of the same class, except that the claim of the Omaha Auto Top Company should be preferred to that of Moise, and that any dividends that Moise should be entitled to should be paid to the Auto Top Company until its claim should be paid in full; . . ."

It will be noted that the provisions of the District Court's order in *Moise v. Scheibel, supra*, are practically identical with the order in the case at bar [R. 38-39], set forth in the petition at pages 6, 7. But, the Eighth Circuit corrected the lower court's error in *Moise v. Scheibel*, saying (245 Fed. at 547):

> "We, however, think the court erred in granting a preference to the claim of the Auto Top Company over that of Moise. They were creditors of the same class, and the evidence does not warrant the establishment of what practically amounts to a lien on the dividends payable to Moise, in favor of the Auto Top

> Company. The evidence tends to show that Moise promised orally that the indebtedness of the Auto Top Company should be paid; but there is no evidence of facts which would create an estoppel on the part of Moise from receiving his dividends on an equality with the Auto Top Company."

In other words, just as in case at bar, no creditor-surety relationship ever came into being, the oral promise to answer for the debt of another being unenforceable there under state law. There, as here, the promisee was a potential creditor. There, as here, the potential obligation failed to become effective because of lack of diligence on the part of the potential obligee. In *Moise v. Scheibel* the promisee failed to procure written evidence of the promise from the surety. In the case at bar the three potential obligees failed to give notice of their claims to the surety.

The decision of the Ninth Circuit in this cause is therefore in direct conflict with that of the Eighth Circuit in *Moise v. Scheibel*, 245 Fed. 546 (1917).

Manifestly, petitioner stands in the shoes of the five diligent parties who became obligees on the bond and are fully paid. In the event of filing of claims by these five diligent parties, they would have been entitled to a *pro rata* share of the general assets. Petitioner is entitled to that share by subrogation, for the basic purpose expressed in the Bankruptcy Act is to bring about a ratable distribution among claimants.

> *Young v. Higbee Co.*, ... U. S. ....., 89 L. ed. (Adv. Ops.) 578 (No. 342, Oct. Term, 1944—Feb. 26, 1945); §65(a), Bankruptcy Act; 11 U. S. C. A. Supp. §105(a).

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted and that this Honorable Court should review the decision of the United States Circuit Court of Appeals for the Ninth Circuit and finally reverse it.

June, 1945.

WILLIAM C. MATHES,
Counsel for Petitioner.

MATHES & SHEPPARD and
GORDON F. HAMPTON,
Of Counsel.

APPENDIX.

Section 1183 of the Code of Civil Procedure of California (1872), as amended by Cal. Am. Code Amdts. 1873-74, p. 409; Cal. Code Amdts. 1880, p. 63, Cal. Stats. 1885, p. 143; Cal. Stats. 1887, p. 152; Cal. Stats. 1899, p. 34; Cal. Stats. 1903, p. 84; Cal. Stats. 1911, p. 1313; Cal. Stats. 1929, p. 1924; reads as follows:

"Mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure, or other work of improvement, or performing labor upon or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the grading, filling in, or other improvement of any lot or tract of land or the making of any improvement in connection therewith, including within the meaning of the said word "improvement" any seeding, sodding or planting of such lot or tract of land for landscaping purposes or the demolition of buildings thereon or the removal of buildings therefrom, made or done on such real property, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power, whether at the instance of the owner, or of any other person act-

ing by his authority or under him, as contractor or otherwise; and every contractor, subcontractor, architect, builder or other person having charge of the construction, alteration, addition to or repair either in whole or in part of any building or other improvement as aforesaid shall be held to be the agent of the owner for the purposes of this chapter.

"Any person who performs labor in any mining claim or claims, or in or upon any real property worked as a mine, either in the development thereof or in working thereon by the subtractive process or furnishes materials to be used or consumed therein, has a lien upon the same and the works owned and used by the owners for milling or reducing the ores from the same, for the value of the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of such mining claim or claims or real property worked as a mine, or his agent, and every contractor, subcontractor, superintendent or other person having charge of any mining or work or labor performed in and about such mining claim or claims or real property worked as a mine, either as lessee or under a working bond or contract thereon shall be held to be the agent of the owner for the purposes of this chapter.

"The liens in this chapter provided for shall be direct liens, and shall not in the case of any claimants, other than the contractor be limited, as to amount, by any contract price agreed upon between the contractor and the owner except as hereinafter provided; but said several liens shall not in any case exceed in amount the reasonable value of the labor done or material furnished, or both, for which the lien is claimed, nor the price agreed upon for the same between the claimant and the person by

whom he was employed, nor in any case, where the claimant was employed by a contractor, or subcontractor shall the lien extend to any labor or materials not embraced within or covered by the original contract between the contractor and the owner, or any modification thereof made by or with the consent of such owner, and of which such contract, or modification thereof the claimant shall have had actual notice before the performance of such labor or the furnishing of such materials. The filing of such original contract, or modification thereof, in the office of the county recorder of the county where the property is situated, before the commencement of the work, shall be equivalent to the giving of such actual notice by the owner to all persons performing work or furnishing materials thereunder.

"In case said original contract shall, before the work is commenced, be so filed, together with a bond of the contractor with good and sufficient sureties in an amount not less than fifty (50) per cent of the contract price named in said contract, which bond shall in addition to any conditions for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in, or furnishing appliances, teams or power contributing to, such work, and shall also by its terms be made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in or furnish appliances, teams or power contributing to, the work described in said contract as to give such persons a right of action to recover upon said bond in any suit brought to foreclose the liens provided for in this chapter or in a separate suit brought on said bond, then the court must, where it would be equitable so to do, restrict the

recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor, and render judgment against the contractor and his sureties on said bond for any deficiency or difference there may remain between said amount so found to be due to the contractor and the whole amount found to be due to claimants for such labor or materials or both.

"No change or alteration of the work or modification of any such contract between the owner and his contractor, nor rescission or attempted rescission thereof, or of said bond, nor conditions precedent nor conditions subsequent, contained therein, attempting to limit the right of recovery under said contract or under the bond given for the benefit of laborers and materialmen under the foregoing provision nor any fraud practiced by any person other than such laborer, materialman or other persons seeking to recover thereon nor any change in any agreement pertaining to the furnishing of labor or materials, nor the terms or time of payment thereof, shall release or exonerate any surety or sureties upon any bond given under this section. All bonds given pursuant to the provisions of this chapter will be construed most strongly against the surety and in favor of all persons for whose benefit such a bond is given, and under no circumstances shall a surety be in anywise released from liability to the said laborers or materialmen or persons furnishing appliances, teams or power, for whose benefit said bond has been written, by reason of any breach of contract between owner and contractor or on the part of any obligee named in said bond, but the sole condition of recovery on the part of such person furnishing labor or material or appliances, teams or power as aforesaid, shall

be that said labor or material has been used or consumed in or said appliances, teams or power have contributed to the work of improvement to which said bond refers, and that the said third person for whose benefit said bond has so been made to inure has not been actually paid some part or all of the sums due him for the same.

"No provisions in any of the bonds given pursuant to any of the provisions of this chapter attempting by contract to shorten the period prescribed for the commencement of an action thereon as laid down in section 337 of this code, shall be valid if such provision attempts to limit the time for commencement of action thereon to a shorter period than six months from the completion of said structure or work of improvement, as "completion" is defined in section 1187 of this code, nor shall any provision in any of said bonds attempting to limit the period for the commencement of actions thereon be valid in so far as actions brought by persons furnishing labor or materials, appliances or teams or power as aforesaid, are concerned, unless said bond be filed for record, with the contract to which it refers, before the work of improvement is commenced, with the county recorder of the county or city and county in which the property referred to therein, or some part thereof, is situated.

"In case the surety or sureties on any bond given as in this chapter provided shall have caused said bond to be filed and recorded in the office of the county recorder of the county in which the property is situated, before the work of improvement is completed, then no action may be maintained thereon unless there shall previously have either been filed a mechanic's lien claim as in this chapter provided or unless written notice shall previously have been given to the surety on said bond before the expiration

of the time prescribed in this chapter for filing a lien to enforce such claim, which notice shall state that the person giving such notice has performed labor or furnished materials, or both, or furnished appliances, teams or power, to the contractor or other person acting by the authority of the owner, or that they have agreed to do so, stating in general terms the kind of labor, materials, appliances, teams or power and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. The filing of an action to foreclose such lien shall not be a condition precedent to a recovery on said bond. If said bond has been so filed as herein last provided then any suit brought against such surety or sureties shall be filed within six months after completion of said structure or work of improvement, as "completion" is defined in section 1187 of this code.

"The written notice to be given to the surety or sureties hereinabove provided for may be given by delivery thereof personally to, or by depositing same in the mail, postage prepaid, and registered, addressed,

(1) If to an individual surety, at his residence or place of business, if known, or

(2) If to an individual surety and his residence is unknown, then in care of the county clerk of the county in which said bond has been so filed, or

(3) At the place designated as the residence of the surety in the certificate, if any, filed by such surety or sureties as provided by section 1163 of the Civil Code, or

(4) If to a corporate surety, at the office or care of the agent designated by the surety in the bond as the address to which such notice shall be sent, or

(5) At the office or care of any officer of the surety in the state of California, or

(6) At the office of or care of the statutory agent of the surety in the state of California, or

(7) By service in the manner prescribed for the service of summons as provided by section 411 of the Code of Civil Procedure.

"It is the intent and purpose of this section to limit the owner's liability, in all cases, to the measure of the contract price where he shall have filed or caused to be filed in good faith with his original contract a valid bond with good and sufficient sureties in the amount and upon the conditions as herein provided. It shall be lawful for the owner to protect himself against any failure of the contractor to perform his contract and make full payment for all work done and materials furnished thereunder by exacting such bond or other security as he may deem necessary." (Italics added.)

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No. 142

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

AMERICAN SURETY COMPANY OF NEW YORK,
A CORPORATION,
Petitioner,

vs.

PAUL W. SAMPSELL, AS TRUSTEE IN BANKRUPTCY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

HOMER CUMMINGS,
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Counsel for Petitioner.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court (R. 93) is reported at 53 F. Supp. 131 as *In re Stratton*. The opinion of the Circuit Court of Appeals (R. 126) is reported at 148 F. 2d 986.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on April 24, 1945 (R. 131). The petition for a writ of certiorari was filed June 21, 1945, and was granted on October 8, 1945 (R. 133). Jurisdiction of

this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, § 1, 43 Stat. 938; 28 U. S. C. § 347(a)) and under Section 24(c) of the Bankruptcy Act of July 1, 1898 (c. 541, 30 Stat. 553) as amended by the Act of June 22, 1938 (c. 575, § 1, 52 Stat. 854; 11 U. S. C. § 47(c)).

Question Presented

In the absence of any provision of federal law on the subject may a federal bankruptcy court, as a condition to allowing the general claim of a subrogated surety against a bankrupt principal, require the surety first to satisfy other general creditors who, prior to the bankruptcy proceedings, had failed to perfect and had therefore lost their potential claims against the surety under the state law pursuant to which the surety bond had been given and by which its coverage and operation were governed?

Statute Involved

The seventh paragraph of § 1183 of the Code of Civil Procedure of California (R. 89-90; hereinafter cited as C. C. P.) reads in part as follows:

> In case the surety or sureties on any bond given as in this chapter provided shall have caused said bond to be filed and recorded in the office of the county recorder of the county in which the property is situated, before the work of improvement is completed, then no action may be maintained thereon unless there shall previously have either been filed a mechanic's lien claim as in this chapter provided or unless written notice shall previously have been given to the surety on said bond before the expiration of the time prescribed in this chapter for filing a lien to enforce such claim . . .

Other relevant provisions of the California statutes are referred to in the argument, as are various provisions of the federal bankruptcy laws.

Statement

The facts, which are either stipulated (R. 85-92) or documentary, are as follows:

On January 2, 1941, Charles B. Stratton, the bankrupt, contracted with General Electric Company to make certain alterations in that company's factory building at Ontario, San Bernardino County, California (R. 87). On January 3, 1941, Stratton applied to petitioner, American Surety Company of New York, for a statutory laborers' and materialmen's bond (R. 85-86; see 58-67), which was executed in the sum of $33,950 (R. 86-88). On January 7, 1941, the plans and specifications, the construction contract, and the bond were filed and recorded in the office of the Recorder of San Bernardino County pursuant to § 1183 of the California Code of Civil Procedure (R. 88). On September 10, 1941, a notice of the completion of the work was similarly recorded (R. 89).

It is stipulated that on or about October 10, 1941, under California law (§ 1187, C. C. P.) the time expired for laborers and materialmen to file and record claims of lien (R. 89), which by another provision of California law is also the time limit for the permissible alternative notice to the surety (§ 1183, C. C. P.; R. 89). Five laborers and materialmen filed and recorded claims of lien and lodged timely written notices with the surety pursuant to the California statute (R. 90). Petitioner paid these in full in the total sum of $6,724.78 (R. 90-91).

On November 10, 1941, an involuntary bankruptcy petition was filed against Stratton (R. 2-8). On November 27, 1941, he was adjudged a bankrupt (R. 11).

The petitioner, as authorized by the Bankruptcy Act (11 U. S. C. § 93(i)), filed with the referee in bankruptcy its proof of claim for $6,987.48 (R. 52-56) based upon the indemnity agreement with Stratton (R. 63-65) and upon subrogation for the $6,724.78 in claims paid and $262.70 in expenses incurred (R. 29). The petitioner's entire claim was allowed as a general claim (R. 30, 36).

Among the general claims filed there appeared three others (R. 68-74, 75-81, 82-85) in the total sum of $1,336.11, based upon labor and materials furnished to Stratton in connection with the General Electric Company contract, for which no claim of lien had ever been recorded or notice to the surety given (R. 35-36, 91-92). These were allowed as general claims in bankruptcy (R. 36-37). Moreover, the referee in bankruptcy, admitting that these three claimants had "no cause of action which they could bring under law" against the surety, concluded that—because they were of the class of creditors for whose protection the bond had been written—the surety should receive no dividends from the estate upon its claim until these three had been paid in full (R. 37-38). He then ordered that, in addition to the dividends the three might receive upon their own claims, they should share pro rata in the dividend otherwise due the petitioner until they had been paid in full or the petitioner's dividend had been exhausted (R. 38). Thereafter any balance remaining of the petitioner's dividend might be paid to it (R. 38).

The petitioner then asked review of the referee's order (R. 41-48). Respondent Sampsell, as trustee for the bankrupt, secured an order requiring petitioner to show cause why the referee's decision should not be carried out (R. 48-51, 51-52). The District Court affirmed the referee (R. 93-99). The Circuit Court of Appeals for the Ninth Circuit concurred in that conclusion (R. 126-131).

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In determining this controversy "without appropriate regard for rights acquired under rules of state law" through its refusal to recognize the California statute and decisions establishing the fact that on its surety bond petitioner has never been liable to certain other claimants to the bankrupt estate in whose favor petitioner's claim is subordinated by its decision.

2. In failing to give any effect to state law governing the substantive rights of claimants where a dispute arises between them in a bankruptcy proceeding.

3. In ordering the dividends on petitioner's allowed claim in bankruptcy to be paid to certain other creditors of the bankrupt to whom petitioner is not and has never been indebted.

4. In depriving the surety, contrary to equitable principles, of the usual bankruptcy rule of equality of distribution (Section 65(a), Bankruptcy Act) where the surety's claim is for subrogation after full payment of all valid claims of creditors under the statutory bond in this case although certain potential creditors of the surety were not paid solely because of their own lack of diligence in failing to perfect their rights as required by state statute in order to become actual creditors under the bond.

Summary of Argument

The question here is not whether the unpaid creditors are not proper general creditors, but whether they had or might be given a special status as secured creditors.

I. Under the law of California the rights of the three unpaid laborers and materialmen under the bond had never

been more than inchoate and even as such had been completely extinguished prior to the bankruptcy proceedings. The California statutes (1) state the basic lien liability of the owner of realty upon which improvements are made, (2) preserve other general remedies against the contractor who does the work, and (3) provide for both a limitation and partial substitution of the owner's liability through the procurement and filing of a contractor's bond such as here involved. Claims against the bond are not perfected until, within a specified period after the completion of the work, the filing of a claim of lien or the giving of notice to the surety. The courts of California permit no deviation from these requirements. Having failed to give the required notice or file a claim of lien, the unpaid laborers and materialmen lost any rights they might have perfected under the bond.

II. Federal law not only fails to authorize the revival and perfection of the lost claims under the bond but requires adherence to the state law by which those claims became extinct. The relevant state statutes are fully applicable here because (1) the bankruptcy laws contain or require nothing to the contrary, (2) the state law is therefore the rule of decision in the federal bankruptcy tribunal, and (3) there is no problem of equitable distribution because the claimants had no status as secured creditors.

ARGUMENT

The Circuit Court of Appeals (R. 129-130) held that:

> This is not an action on a bond, but is a bankruptcy proceeding. In this proceeding, the bankruptcy court was required to, and did, determine the relative rights of creditors—Campbell, Probert, Stevens, appellant and others—in the distribution of the bankrupt's estate. That determination was governed by Federal

law, not State law. We therefore have no occasion to consider the State court decisions cited by appellant.

Therein the court below failed to perceive that the question in issue was whether—under the state law which created the bond and governed the obligations thereunder—there was anything for the bankruptcy court to compose.

One other matter requires preliminary emphasis. There is no contention here that these unpaid laborers and materialmen do not have a claim for their services or supplies furnished. The California statute specifically preserves such rights (§ 1197, C. C. P.). That claim has been allowed in these proceedings as a general claim (R. 36-37). The question is whether they have an additional claim against the surety on a bond given to protect the owner of the realty from so-called mechanics' liens. If they have such additional claim, we may assume for sake of argument that they are entitled to payment by the surety before the surety may receive dividends from the bankrupt estate. If they have no such additional claim, they—like the subrogated surety—are entitled to participate in the proceeds of the bankrupt estate only as ordinary general creditors. The question here is, Did they have special rights under the bond or merely general claims for services and materials furnished?

I. Under the law of California the rights of the three unpaid laborers and materialmen under the bond had never been more than inchoate and even as such had been completely extinguished prior to the bankruptcy proceedings.

The rights here in issue are based on statutory liens on real property.[1] Provisions of the California Code of Civil

[1] The California Civil Code classifies liens as either "general or special" (§ 2873). Either is defined as "one which the holder thereof is entitled to enforce • • •" (§ 2874 and § 2875). But the Civil Code does not

Procedure (1) state the basic lien liability of the owner of realty upon which improvements are made, (2) preserve other general remedies against the contractor who does the work, and (3) provide for both a limitation and partial substitution of the owner's liability through the procurement and filing of certain bonds such as the one here involved. Thus the surety is substituted not for the contractor-bankrupt as the District Court seemed to assume (R. 97) but for the owner of the realty upon which the contractor was engaged to make improvements, and then only to the extent provided by the state law from which the laborers' and materialmen's lien or substituted bond springs. The following is an analysis of the state statutes:

(1) Laborers and materialmen "have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished" (§ 1183, first ¶). If the property is not sufficient, personal judgment for deficiency may be obtained "in like manner and with like effect as in action for the foreclosure of mortgages" (§ 1194). Persons claiming the benefits of these provisions, "until thirty days after the completion of such work of improvement, as a whole, may file for record with the county recorder * * * a claim of lien" (§ 1187, first ¶) but, if the owner of the realty within ten days of the completion of the work fails to file with the county recorder a notice of completion, then the claim of lien may be filed within ninety days after the completion of the work (*id.*, third ¶). (In the case at bar the notice of

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create or define the lien. The California Code of Civil Procedure, in Part III entitled "Special Proceedings of a Civil Nature", contains in Title IV provisions respecting the so-called "Enforcement of Liens". Chapter I does no more than define a lien as "a charge imposed upon specific property, by which it is made security for the performance of an act" (§1180). Chapter II, with which this case is concerned, is entitled "Liens of Mechanics and Others upon Real Property".

completion was duly filed (R. 89), consequently the time for filing claim of lien was thirty days.) To enforce the lien so claimed, action must be brought within periods specified by statute after such filing (§ 1184a and § 1190).

(2) The contractor is nevertheless liable to the laborers or materialmen who have furnished services or materials (§ 1184c and § 1197). He is also required to defend actions brought against the owner of the realty, and with his bondsmen is liable to such owner for moneys the latter is required to expend upon lien claims (§ 1193).

(3) However, if the owner of the realty files his construction contract with the county recorder together with a bond for not less than half the contract price, conditioned for the payment of laborers and materialmen in any suit to foreclose the liens provided or in any suit upon the bond, then the liability of the owner is restricted to the amount due the contractor and the claimants must look to the contractor and his sureties on the bond for any excess (§ 1183, fourth and ninth ¶¶). If a contract and bond are so filed, the terms of the bond may limit actions upon it to six months from the completion of the work (*id.*, sixth ¶). If the contract and bond are so filed (*id.*, seventh ¶),

> then no action may be maintained thereon unless there shall previously have either been filed a mechanics' lien claim as in this chapter provided or unless written notice shall previously have been given to the surety on said bond before the expiration of the time prescribed in this chapter for filing a lien to enforce such claim * * *.

The nature of the notice in lieu of filing of a mechanics' lien is also prescribed (*id.*, eighth ¶). The time limit referred to is the 30-day period noted above (*id.*, first ¶).

It is manifest that the liens or rights substituted therefor are procedural devices to secure the payment of laborers

or materialmen. They are entirely creatures of statute, over and beyond the usual and preserved creditor rights of such persons (§ 1197). Certain steps are required to perfect the remedies so provided. Either a claim of lien or notice to a surety must be filed or given within prescribed time calculated from the date of the completion of the work. Even the statute of limitation measures from the time such lien is filed (§ 1190).

The bond.—It is stipulated that the bond is a form designated as "Laborers & Materialmen, Statutory Form for California" (R. 86). Except for names, dates, and amounts it is in the language of the statute.[2] That it does not cover more than the statute is the law of California. "The terms of the statute are read into the bond and control its interpretation and effect." *Carpenter* v. *National Surety Co.*, 25 Cal. App. 2d 90, 93, 76 P. 2d 523.

Construction.—The statutory provisions quoted or summarized above leave no room for construction, and the courts of California have found none. Either strict or substantial compliance with every term of the statute has frequently been enunciated as the only possible rule.[3] The

[2] The first paragraph states its coverage in the words of the fourth paragraph of § 1183, from which also is taken the language of the second sentence of the second paragraph of the bond relating to coverage. The concluding statement of a time limit for action upon the bond is taken from the sixth paragraph of the same section and expressly authorized thereby.

[3] The following is a fair summary of the California case law: "Mechanics liens are entirely of statutory creation, and the statute must be looked to both for the right to the lien and the mode by which it can be enforced. The right to a mechanic's lien depends upon compliance with the statute, and in order that a valid lien may arise and be enforced, the claimant must strictly, or at least substantially, observe and comply with the provisions of the statute, none of which may be regarded as unnecessary. It is unnecessary, however, to take any other step than is thus required. The mere furnishing of labor or material does not create a lien; but until the claim is perfected in compliance with the statute it is a mere inchoate personal right which the mechanic or materialman may perfect or not

necessity of filing a claim of lien is particularly insisted upon.[4] "In order, however, that the laborer or materialman may preserve and enforce his lien, he must file his claim therefor * * *" *Willamette etc. Co.* v. *College Co.*, 94 Cal. 229, 237, 29 P. 629. See the same effect *Weithoff* v. *Murray*, 76 Cal. 508, 18 P. 435; *Pacific Mut. L. I. Co.* v. *Fisher*, 106 Cal. 224, 39 P. 758; *Joost* v. *Sullivan*, 111 Cal. 286, 43 P. 896; *Hickman* v. *Freiermuth*, 21 Cal. App. 629, 132 P. 772, 773; *Pacific Mfg. Co.* v. *Rasmussen*, 42 Cal. App. 742, 746-747, 184 P. 54; *Norton* v. *Bedell Engineering Co.*, 88 Cal. App. 777, 264 P. 311. Without such compliance with the statutory requirements, the party has "merely a personal right to create a lien by complying with the statute"—a "mere personal, inchoate right to procure a lien". *Mills* v. *LaVerne Land Co.*, 97 Cal. 254, 257, 32 P. 169. To the extent that these decisions relate to claims against the owner of the realty rather than the similar filing or giving of notice respecting a substituted surety, they nevertheless state the policy of California with regard to the duties of laborers and materialmen under the same statutes and in connection with the same type of requirement. The filing of claims or notices in connection with bonds required of public improve-

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at his pleasure, and which, until perfected, has no tangible existence. A party desiring to hold and enforce a lien upon the property of one who did not employ him must bring his case clearly within the terms of the statute; and under the former provision that a contract not recorded should be void and labor and materials should be deemed to have been done and furnished at the personal instance of the owner, it was incumbent on a laborer desiring to preserve his lien to follow the provisions prescribed where labor had in fact been performed at the personal insistence of the owner." 17 Cal. Jur. § 50.

[4] The California case law on the point has been accurately summarized as follows: "While the lien of a mechanic or materialman is a constitutional right and attaches to the structure as the material is furnished or labor performed, it is not enforceable unless a claim of lien is filed within the specified period. The lien of a contractor under his contract is given solely by the statutory provisions in his behalf; no lien arises from the mere completion of the structure, but such completion must be followed by a claim of lien." 17 Cal. Jur. § 68.

ment contractors, under the same or parallel statutes, are as strictly construed. *A. L. Young Machinery Co.* v. *Cupps*, 213 Cal. 210, 2 P. 2d 321; *Republic Iron & Steel Co.* v. *Patillo*, 19 Cal. App. 316, 125 P. 923; *Smith* v. *McKnight*, 117 Cal. App. 427, 4 P. 2d 305. In any event, in the absence of California decisions to the contrary, the California statutes speak for themselves.

Here, it should be noted, the inchoate right to perfect what the statute had once offered was lost by the inaction of certain laborers and materialmen before the bankruptcy proceedings were initiated.[5] Consequently, if it could be revived and then perfected in the present proceedings, authority therefor must be found in the federal bankruptcy statutes—authority which the court below assumed and asserted but did not identify.

II. Federal law not only fails to authorize the revival and perfection of the lost claims under the bond but requires adherence to the state law by which those claims became extinct.

The relevant state statutes are fully applicable here because (1) the bankruptcy laws contain or require nothing to the contrary, (2) the state law is therefore the rule of decision in the federal tribunal, and (3) there is no problem of equitable distribution because the claimants had no rights whatever under the bond.

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[5] As stated heretofore in the Statement and text, the notice of completion of the work was filed September 10, 1941 (R. 89). Hence, under the California law (§ 1183) and as stipulated (R. 89), the time for filing a claim of lien or alternatively giving notice to the surety expired the following October 10. The bankruptcy proceedings were not commenced until the following November 19 (R. 2-8).

1. The federal Bankruptcy Act not only does not supersede the state law but, by clear implication at least, requires that the state law be followed.

The federal bankruptcy statutes, from which the federal bankruptcy courts receive their sole authority, do not supersede the state law here involved. The whole purpose of the bankruptcy law is to marshal and compose the assets, including "debts" (11 U. S. C. § 103), of the bankrupt for the benefit of creditors. The existence of these "debts" must naturally be determined under the law by which they are created or recognized except as the contrary may be expressly provided in the federal bankruptcy statutes. Assuming that it is within federal power to supersede state law in the respects here involved, Congress has not done so.

On the other hand, the bankruptcy statutes expressly recognize and provide for the operation of state laws. Thus, if the bankrupt in this case were a laborer or materialman under the very bond here involved, the following provision of the bankruptcy laws would apply (11 U. S. C. § 29(e); emphasis supplied):

> Where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and *where in any such case such period had not expired at the date of the filing of the petition in bankruptcy*, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement, or in the proceeding or by applicable Federal or State law, as the case may be.

This provision is the strongest possible recognition that state law prevails even in such a paramount matter as the preservation of the estate of the bankrupt.

Where a claim or lien might run against the bankrupt, the bankruptcy law also makes special provision which reads in part as follows (11 U. S. C. § 107(b), emphasis supplied):

> Statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons * * * created or recognized by the laws of the United States or of any State * * * may be valid against the trustee * * * Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, *if perfected within the time permitted by and in accordance with the requirements of such laws* * * *

Here, in connection with the same subject matter as is involved in the case at bar, is another express statutory provision recognizing the applicability of time limitations required by state law.

These provisions—one where the bankrupt asserts the claim, the other when a lien runs against him—exhaust the needs of the federal bankruptcy laws in the subject here involved. If in the present case inchoate and expired rights may be revived without compliance with state law, then they are preferred even above similar claims by or against the bankrupt. Sound statutory construction does not permit that such an irrational difference be engrafted upon the law.

2. Apart from the bankruptcy statutes, federal law supplies the rule of decision only where so required or provided—as is not the situation here.

No federal requirement is applicable to the situation here presented, nor is one required.[6] The otherwise applicable state statutes in no way interfere with the operations of federal bankruptcy courts. Hence, except that the forms and modes of proceeding are governed by federal law,[7] both by statute[8] and upon constitutional principle,[9] state law necessarily applies and governs. "The great body of law in this country which controls acquisition, transmission and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found

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[6] The rule requiring conformity with state law does not apply "where the Constitution, treaties, or statutes of the United States otherwise require or provide" (1 Stat. 73, 92; 28 U. S. C. § 725) or "in matters governed by the Federal Constitution or by Acts of Congress." *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 77, 78. Where the right or claim arises upon federal law, the remedial details required to be supplied by judicial implication require in each instance the fashioning of a rule which is "ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of" the state in which the matter is presented. *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349-350; *Deitrick* v. *Greaney*, 309 U. S. 190, 200-201; *Helvering* v. *Leonard*, 310 U. S. 80, 85-86; *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 468; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245; *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, 52; *United States* v. *Pink*, 315 U. S. 203, 230 *et seq.*; *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 299; *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176-177; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366-367; *Anderson* v. *Abbott*, 321 U. S. 349, 365; *Note*, 54 Harv. L. Rev. 663, 665 n. 16.

[7] *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 452.

[8] The Rules of Decision Act, 28 U. S. C. § 725, provides that: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

[9] *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 79-80. Here the state law involved is statutory, and hence even the doctrine of *Swift* v. *Tyson*, 16 Pet. 1, would govern and the state statutory requirements would prevail. *D'Oench, Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447, 465-467.

in the statutes and decisions of the state." *Davies Warehouse* v. *Bowles*, 321 U. S. 144, 155. This is so whether cases are pending in federal courts either because of the accident of diversity of citizenship [10] or because federal courts are the forum for other reasons.

Where the bankruptcy law deals with property rights regulated by state law, the federal courts in bankruptcy will follow the state courts even to the extent of permitting contractual or state liens to operate upon property after bankruptcy proceedings are begun. *Chicago Board of Trade* v. *Johnson*, 264 U. S. 1, 11, 15; *Security Mortgage Co.* v. *Powers*, 278 U. S. 149; *In re Wil-Low Cafeterias, Inc.*, 22 F. Supp. 522, 523. Conversely, rights to perfect liens or to perfect rights against substituted security, which have been extinguished or lost under state law, cannot be revived in bankruptcy proceedings. In *In re Willax*, 93 F. 2d 293, 295, the Circuit Court of Appeals for the Second Circuit said:

> There is nothing in the statute that enables the bankruptcy court to recognize a lien which the lienor has failed to continue in the way prescribed by the state law. Mechanics' liens are creatures of the law of the state where the real property is situated—in the present case New York—and that law governs the method whereby they may be continued as well as the mode of their creation. * * * Because the liens were not continued in any of the ways prescribed by the state law, they had lost all efficacy * * *

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[10] This Court has been careful to say, in requiring conformity with state law, that the cases, though brought in federal courts, are not there because the substance is created by federal law but because of the accident of diversity of citizenship. *West* v. *A. T. & T. Co.*, 311 U. S. 223, 231; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, 467; *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 540; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496; *Griffin* v. *McCoach*, 313 U. S. 498, 503.

Similarly in *Malott & Peterson* v. *Street*, 4 F. 2d 770, 772, the court below said:

> No doubt, the plaintiff in error might have filed a lien against the property * * * but it did not do so, and the time for filing such a lien had expired long before the adjudication in bankruptcy. * * * The plaintiff in error took none of the steps required by the statute to perfect its rights.

Thus the Circuit Court of Appeals, for the Ninth Circuit—which avows a contrary rule in the case at bar—properly insisted in the *Malott* case upon compliance with state law and rejected claims not perfected in accordance with the requirements of the California laborers' and materialmen's lien statutes.

While a court of bankruptcy has exclusive control over the administration of an estate in its possession, it may even submit to state courts particular controversies involving unsettled questions of state property law arising in the course of bankruptcy administration. *Thompson* v. *Magnolia Co.*, 309 U. S. 478, 483. The only state law which is superseded is the rules governing the method of liquidation of insolvent estates; but, even then, it must act with "appropriate regard for rights acquired under rules of state law". *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95, 97. The question here is not the distribution to admittedly qualified claimants, but whether the claimants had under state law acquired any claim to the security substituted for the lien.

3. No problem respecting equitable distribution is presented, because the question is not one of allocation but whether the claimants had any rights.

It is an established rule in bankruptcy that a surety of an insolvent's obligation will not be permitted, either by taking

indemnity from his principal or by virtue of his right of subrogation, to compete with other creditors whose claims he has assured in whole or part but which had not been paid in full—because, to the extent that the surety thus participates in dividends from the bankrupt estate, he depletes the estate otherwise available to those secured and defeats the purpose of the suretyship. *Prudence Corp.* v. *Geist, supra,* p. 96; *American Surety Co.* v. *Electric Co.,* 296 U. S. 133. This rests upon the rule of the law of subrogation that a surety liable only for part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied. *United States* v. *National Surety Co.,* 254 U. S. 73, 76. Nor may the same result be had by agreement for indemnity rather than subrogation. *Jenkins* v. *National Surety Co.,* 277 U. S. 258, 267.

However, that general rule has been applied only where the creditors so preferred have been effectively covered by the instrument of suretyship. The cases involve assured creditors whose claims not only have been covered but have been paid in part. The cases, and the principle, do not apply where the creditors are not or never were covered by the instrument of suretyship. For the reasons heretofore given, whether in the case at bar the three unpaid creditors had ever been covered by the bond of petitioner is a question of state law, which denies them the status of secured creditors. They might have been, but they failed or neglected to perfect that status. They are therefore nothing more than general creditors. The surety is expressly authorized to file its subrogated claim in federal bankruptcy proceedings (11 U. S. C. § 93(i)). It is therefore entitled as a general creditor to an equal per centum of the dividends paid out of the bankrupt estate to general creditors (11 U. S. C. § 105(a)). The bankruptcy court may not grant

a preference to some of them or grant some of them "what practically amounts to a lien" on the dividends payable to another general creditor. *Moise* v. *Scheibel*, 245 Fed. 546, 547 (C. C. A. 8). To permit the surety as a general creditor to stand in the shoes of the secured creditors whose claims it has actually paid does not prejudice the rights of other general creditors. *American Surety Co.* v. *Bethlehem Bank*, 314 U. S. 314, 318.

A further word may be said respecting the decision of this Court in *American Surety Co.* v. *Electric Co.*, *supra*, upon which the courts below relied. There, as in the other cases cited above, the creditors which were preferred were effectively covered by the suretyship instrument. No question of state law was presented, because the claim arose upon a federal building project, under a federal statute, and pursuant to a federal bond. There also the question did not involve subrogation to the bankrupt estate but claims to a fund set apart as collateral security, and the decision of the Court concedes that "the distinction might be important if the contest were between the surety and creditors not covered by the bond" (p. 138). The Court added that "slight differences in the facts may cause the equities to vary" and that the decision "must be kept within the bounds of the controversy" there involved (p. 139). That decision is wholly inapplicable here, because there the creditors were effectively secured. Here, by the operation of state law, they were not and indeed any rights they had to become secured had been extinguished prior to the bankruptcy proceedings.

Conclusion

The issue of this case is whether there shall be due recognition of the dignity and applicability of state statutes in causes which happen to be pending in federal tribunals. The federal Rules of Decision Act so requires. This Court

has been insistent that the law of the states, judicial as well as statutory, shall be accorded that effect. A breach in that policy will loose a flood of contention, in all manner of cases, that state law is superseded in one way or another.

For the reasons and upon the authorities stated, the judgment below should be reversed.

Respectfully submitted,

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No. 142

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

AMERICAN SURETY COMPANY OF NEW YORK,
A CORPORATION,
Petitioner,

vs.

PAUL W. SAMPSELL, AS TRUSTEE IN BANKRUPTCY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent makes several arguments in his brief which, although fully met by the materials set forth in petitioner's opening brief, may for the convenience of the Court be answered as follows:

1. The question presented is not the nature of equitable distribution in bankruptcy-suretyship cases, but whether there was any surety relationship upon which exercise of the rule of equitable distribution could be predicated by the bankruptcy court.

Half of respondent's brief (pp. 1-6) is devoted to a discussion of the authorities respecting equitable distribution of the bankrupt estate, which preclude a surety from sharing in distribution until the secured general creditors have been made whole. Petitioner's opening brief assumes this state of the law (pp. 17-19), but contests its applicability in a situation where—as here—an inchoate surety relationship was extinguished under governing state law prior to the institution of bankruptcy proceedings. That is the question presented (Pet. Br. 2) as respondent admits (Resp. Br. 8). Petitioner does not, as respondent suggests (Resp. Br. 2), attempt to limit the rule of equitable distribution—because no such rule is applicable in this case in any respect. The authorities cited in respondent's brief (pp. 1-6) are inapplicable to the question here presented because in no one of them was there any question as to the existence under state or federal law of the necessary, valid, and subsisting surety relationship. Recognizing that there is such a question in this case, the remainder of respondent's brief is devoted to the attempt to show that there was an existing surety relationship.

2. Respondent's assertion that the Constitution of California breathes life into a surety relationship otherwise dead under the California statutes and decisions is untenable both (1) because the cited provision of the California Constitution does not apply to bonds and (2) because the California courts hold that this provision of the California Constitution is not operative apart from the California statutes.

In attempting to show that there was an existing surety relationship during the bankruptcy proceedings, respondent opens his argument with the statement that the California Constitution itself protects laborers and mater-

ialmen. But the cited provision (Art. XX §15, Resp. Br. 7) has no relation whatever to bonds and suretyship but, instead, provides for a lien "upon the property upon which they have bestowed labor or furnished material." If that provision has any effect apart from legislation, it is operative not against the bankrupt contractor or his surety but against the General Electric Company which owns the factory property upon which the alterations were made and for which labor and materials were furnished.

Furthermore, whatever its effect may be apart from legislation, the California courts hold that the constitutional provision is not self-operative. In *Spinney v. Griffith*, 98 Cal. 149, 32 P. 974, the Supreme Court of California holds that the constitutional

> declaration of a right *** is inoperative except as supplemented by legislative action.
>
> So far as substantial benefits are concerned, the naked right without the interposition of the legislature is like the earth before the creation, "without form and void", or to put it in the usual form, the constitution in this respect is not self-executing. [pp. 151-152.]
>
> The "lien law" is with us preeminently a creature of statute. [p. 153.]
>
> The lien *** is the creation of statute ***. We must look to the source of its being, the statute, alike for the right to such a lien and the mode by which it can be secured.

To the same effect see *Ferger v. Gearhart*, 44 Cal. App. 245, 247, 186 P. 376, which involved the statutory requirement that a lien be filed within the time provided by the statute. "The right to the lien is purely statutory." *McLaughlin v. Perkins*, 102 Cal. 502, 506, 36 P. 839 (involving the statutory requirement of filing within 30 days). Respondent is therefore in error in stating (Br. 7) that the right of lien arises from the Constitution itself.

Respondent also takes issue (Br. 8-10) with petitioner's statement (Br. 8) that under California law the bond is substituted for the liability of the property. But it is obvious on the face of the California statutes that a substitution is precisely what occurs and the Supreme Court of California so treats the situation. *Roystone Co. v. Darling*, 171 Cal. 526, 542, 154 P. 15.

Similarly respondent is in error in stating that the lien-bond statutes merely supply the means of enforcement (Br. 8, 12). The *Spinney* and other California cases cited above unequivocally hold that the right of laborers and materialmen is wholly the creature of statute in every respect. "The actual right of lien, as well as the remedy for its enforcement, is derived from the statute ***". *Bailey etc. Iron Co. v. Goldschmidt*, 33 Cal. App. 661, 663, 166 P. 363. To be sure, the so-called mechanics' lien statutes of California are "remedial in character" in the sense that thereby laborers and materialmen may have security for their claims over and above their ordinary right of action, but the failure to follow the statute and comply with requirements in all substantial respects such as the filing of liens within the time provided is fatal to the existence of such security rights. *Hammond Lumber Co. v. Barth Invest. Corp.*, 202 Cal. 601. Respondent (Br. 8) cites *Cutler-Hammond, Inc v. Wayne*, 101 F. 2d 823; but there the Circuit Court of Appeals for the Fifth Circuit was avowedly dealing with "liens in good standing when bankruptcy comes".

In connection with respondent's argument that the mechanics' lien statutes of California are merely procedural, the statement is made—apparently by way of analogy—that statutes of limitations do not go to the merits of a claim but "merely affect the enforcement of certain remedies" (Resp. Br. 12). However, the California statutes expressly provide (§ 2911, Civil Code) that "a lien is extinguished by the lapse of time within which,

under the provisions of the Code of Civil Procedure, "* * * an action can be brought upon the principal obligation." Absent such a provision, or if it is inapplicable to remedies under bonds as distinguished from liens proper, the state law of limitations would nevertheless apply in federal bankruptcy proceedings where the bankruptcy law—as here—does not modify the situation or create a new right. *Harrigan v. Bergdoll*, 270 U.S. 560, 564. (Of course the issue in this case is not whether the state statute of limitations has run, but whether an indispensable element of the right of laborers or materialmen to security—that is, the requisite filing of lien or notice to the surety—is lacking.)

3. Respondent's argument that the bond alone determines its coverage and the rights of laborers or materialmen is contrary to the applicable law of California.

Throughout his brief (pp. 6, 8, 9, 10, 11-12) and contrary to his argument that the California Constitution governs (see point 2 *supra*), respondent either vigorously argues or assumes that the coverage of, and rights under, the bond here involved are to be determined solely upon the face of the bond. The law of California is otherwise, as fully set forth in petitioner's opening brief (p. 10). "The terms of the statute are read into the bond and control its interpretation and effect." *Carpenter v. National Surety Co.*, 25 Cal. App. 2d 90, 93, 76 P. 2d 523. Since these bonds are forms customarily used, if respondent's point were well taken the courts of California could not arrive at decisions requiring compliance with the statutes.

4. Respondent's argument that a reversal of the judgment would give petitioner surety some undue advantage or be a "detriment" to general claimants is untenable in fact and law.

Respondent argues that, had the three unpaid laborers and materialmen filed their claims, the surety would "have

been liable for a much larger amount" than it actually paid out under the bond (Resp. Br. 13). It is true that, had they filed their claims or given the statutory notice to the surety, they might have collected $1,336.11 from the surety (R. 35-36, 91-92). They neglected to perfect their rights and no one now contends that they could still do so apart from the present bankruptcy proceedings. As reasons for giving them the surety's share of the bankrupt estate, respondent now makes three arguments:

First, respondent suggests that the surety was paid for what it did (Resp. Br. 13). But part of the suretyship was a right of subrogation. The amount of the premium paid to petitioner was fixed with that in mind. Moreover, sureties know that they will not in any event be made whole because bankrupt estates do not pay 100% on each dollar of claim. In this case, despite respondent's assertions to the contrary (Resp. Br. 9-10, 13), petitioner had no security from its principal (R. 55).

Second, respondent argues that the surety (pursuant to its acknowledged right of subrogation) seeks to participate in the estate of the bankrupt "on a parity" with the unpaid laborers and materialmen (Resp. Br. 13). But if it should do so, the situation is the same as if there had been no surety bond—because the surety merely stands in the shoes of the other laborers and materialmen who, but for having perfected their rights under the bond and mechanics' lien statutes, would be seeking in the same dollar amount to share in the estate "on a parity" with the unpaid laborers and materialmen. Since respondent can show no present privity with or perfected right to the suretyship pursuant to which the other laborers and materialmen were paid in full, it cannot now complain that the surety shares equally in the bankrupt estate in substitution for those whom it has paid. If the unsecured laborers and materialmen can make such an argument validly, then

any other unpaid and unsecured claimant can as meritoriously make the same objection to the claims of all sureties in any bankruptcy cases.

Third, respondent insists that the surety can be permitted to share equally in the bankrupt estate only "to the detriment" of unpaid laborers and materialmen (Resp. Br. 13). But the surety's participation in the distribution is no more a "detriment" to them than it is to the other unsecured general creditors. The supposed detriment is to be avoided, if at all, only upon some valid and existing surety relationship between petitioner and the unpaid laborers and materialmen. But the sole point of this case is that there was no surety relationship when the bankruptcy proceedings were initiated and none was lawfully created or assumed thereafter.

As stated in petitioner's opening brief (pp. 19-20) the issue here is whether there shall be due recognition of the dignity and applicability of state statutes in causes which happen to be pending in federal tribunals, at least where federal statutes make no contrary provision. The California law here involved is statutory, and there are no California decisions in derogation of those statutes. Section 4 of the California Code of Civil Procedure expressly provides that

> The code establishes the law of this state respecting the subjects to which it relates ***.

The issue is whether federal courts may, as did the courts below, substitute their judgment as to the existence and enforcement of right arising by virtue of local law despite the unequivocal state of that law to the contrary and in the absence of direction by federal statute. Although respondent asserts in his second caption that "the federal court gave due recognition to the applicability of state statutes" (Resp. Br. 7), the court below frankly took the position that its decision "was governed by Federal law,

not State law" (R. 130). Respondent has not met that issue and, for the reasons stated in petitioner's opening brief, the judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 142.

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

Petitioner,

vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy of the Estate of Charles B. Stratton, doing business under the fictitious firm name and styles of Temple City Building Materials Co. and Stratton Construction Co.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your respondent respectfully submits, in opposition to the petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, that hearing of said petition by this Honorable Court should be denied on the following grounds:

I.

THERE IS NO LEGAL PROPOSITION INVOLVED IN THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT WHICH WOULD JUSTIFY THIS HONORABLE COURT IN HEARING THE PETITION FOR WRIT OF CERTIORARI.

II.

THE JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IS IN ACCORD WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

ARGUMENT.

I.

There Is No Legal Proposition Involved in the Decision of the United States Circuit Court of Appeals for the Ninth Circuit Which Would Justify This Honorable Court in Hearing the Petition for Writ of Certiorari.

As appears from the wording of the surety bond filed by the petitioner, upon which its original liability is predicated, the petitioner bound itself as surety

> ". . . unto any and all persons, furnishing materials used in, upon, for or about the performance of the work contracted to be executed or performed under the contract hereinafter mentioned, and all persons who performed work or labor upon the same, and all persons who supply both work and materials, and whose claim has not been paid by the contractor, company, or corporation, in the just and full sum of Thirty-Three Thousand Nine Hundred and No/100 ($33,950.00) Dollars, for the payment whereof well and truly to be made, said Principal, and Surety bind themselves, their heirs, adminis-

trators, successors and assigns, jointly and severally, firmly by these presents." [R. 86, 87.]

The authorities and argument presented by petitioner are only to the effect that if certain steps are not taken by claimants under such a bond, ultimately the surety will be able to set up such omissions as a defense in the nature of a plea in abatement to the claims. The Circuit Court of Appeals, in referring to the fact that State law was not involved and the matter was purely one of Federal law [R. 130], was not ignoring the provisions of the State law and of the bond itself, as far as a State suit was concerned, but properly considered the fact that the surety, by filing the bond, assumed an obligation, and the materialmen, by delivering the materials in reliance thereon, became creditors, thereby eliminating the contention of the surety that the claimants were never creditors, merely because they never filed suit against the surety. By analogy, the payee of a promissory note is a creditor of the payee, but the payor may defend a suit if brought after the period set out in the statute of limitations has expired, by pleading the statute. However, the payee still remains a creditor, so far as the creditor-debtor relationship is concerned, until he is paid. Let us assume that such promissory note is secured by a mortgage on realty. While the payor may successfully defend suit on the note if the period of the statute of limitations has expired, he nevertheless remains a debtor of the payee, and the payor may not eliminate the encumbrance created by his note secured by the mortgage, which remains in effect against his property, until the creditor is paid in full; and the debtor is prevented from quieting title to his property until the outlawed obligation is paid, because "he who seeks equity must do equity."

It is contended by the petitioner that the decision in the instant case by the Circuit Court conflicts with a decision of the Eighth Circuit in *Moise v. Scheibel*, 245 Fed. 546 (1917), and that therefore this Court should take jurisdiction to determine the alleged conflict. The pertinent facts of the *Moise v. Scheibel* case are set out in the petition for writ of certiorari at pages 25 and 26, and those facts have no relationship whatsoever to the problem in the instant case, which is predicated upon the settled rule of law that a surety cannot participate in dividends from a bankrupt estate until all creditors of the class, for whose protection the bond of the surety was written, are paid in full. No such issue, and no facts upon which such issue could be predicated, were involved in the case of *Moise v. Scheibel*.

II.

The Judgment of the United States Circuit Court of Appeals Is in Accord With the Decisions of the Supreme Court of the United States.

This Honorable Court has considered similar problems and has held that the participation of a surety in distribution from an estate of a bankrupt is limited by the rule that creditors of the class for the protection of which the bond of the surety was written must first be paid in full, and no distinguishing facts exist in the case at bar which would enable the surety to contend to the contrary.

American Surety Co. of New York v. Westinghouse Electric Mfg. Co. (1935), 296 U. S. 133, 56 S. Ct. 9, 80 L. ed. 105, 29 A. B. R. (N. S.) 655;

United States v. National Surety Co. (1920), 254 U. S. 73, 41 S. Ct. 29, 65 L. ed. 143.

And see the concurring opinion of Chief Justice Stone in

Prudence Realization Corp. v. Ferris (1945), 323 U. S. 650, 65 S. Ct. 539, 89 L. ed 456.

The leading text-book on bankruptcy, Collier's 14th edition, Vol. 3, page 291, Par. 57.21, states as follows:

> "A merely partial discharge of the principal debt by the surety, be it prior or subsequent to the date of the filing of the petition in bankruptcy, falls squarely under Section 57i. This section provides that the surety or other secondary debtor 'shall be subrogated to that extent to the rights of the creditor.' Taken at their face value these words would seem to indicate that the creditor who proved his claim on which the surety made a part payment must share his dividends with the surety. Thus if the claim originally amounted to $1,000 and the surety paid $750 thereon, Section 57i conveys the impression that whatever dividends are paid on the $1,000 claim are to be divided between creditors and surety, one-quarter going to the creditor and three-quarters to the surety. The law, however, is otherwise. It allows the original creditor to continue collecting dividends on the *entire* amount of the claim ($1,000 in the previous illustration), until the aggregate of the surety's part payment and the dividends amount to one hundred per cent of the claim. Then only may the surety assert his right to further dividends based on that part of the original claim to which he was subrogated ($750). Whatever the creditor receives in excess of the principal and interest remaining due him is held by him in trust for the surety. In this respect there is no difference between a surety who is secondarily liable for the full amount of the principal debt and one who limited his liability to a certain maximum

(smaller than the principal debt) which he paid in full. Both have to wait until the principal creditor is fully satisfied."

In support of the above proposition the text cites some seven or eight cases as being among the leading cases sustaining the position taken by the Referee and the Ninth Circuit Court of Appeals in the case at bar.

These authorities and the reasoning above set out are confirmed by this Honorable Court in the case of

Prudence Realization Corp. v. Geist, Trustee (1942), 316 U. S. 89, 62 S. Ct. 978, 48 A. B. R. (N. S.) 695;

In that case the Court found that the written arrangement between the parties was different from the usual surety arrangement as found in the case at bar, but in discussing the law applicable to the problem, reaffirmed the contention of the respondent that the surety is not entitled to dividends on its claim until the class of creditors protected by its bond are paid in full.

In the cited case this Honorable Court states (p. 95):

". . . The Bankruptcy Act describes its own criteria for distribution to creditors. In the interpretation and application of federal statutes, federal and not local law applies . . . The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed, . . . and it is for that court—not without appropriate regard for rights acquired under rules of state law—to define and apply federal law in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class . . ."

In the case at bar the filing of the bond and the delivery of the materials created a creditor and debtor relationship between the surety and the materialmen. The obligations to the creditors as described in the Statement of Facts, were not paid. Therefore, there is no question of State law, but a question of subordination of claims, and the equitable powers of the bankruptcy court were properly exercised in this case, although the petitioner criticizes the Trustee and the Referee in Bankruptcy for exerting efforts which petitioner asserts were for the protection of creditors who were not otherwise diligent on their own behalf. After all, the defense of failure to file mechanics' or materialmen's liens or to file suit to foreclose liens, is not a defense going to the merits of a claim, and petitioner herein is not in any moral or equitable position to assert that it has been harmed by the rulings of the court below with reference to this surety bond filed to protect the materialmen. The claims of such materialmen rightfully are recognized as being entitled to participate in dividends to the full extent of such claims before any participation by the surety in the distribution of the bankrupt estate, since such claimants delivered materials and labor to the job and aided in its completion, which enabled the bankrupt estate to realize therefrom moneys for dividend distribution, thereby lessening the liability of the surety to the claimants. True, the surety has paid out money in discharging a claim against the bankrupt, but, as a surety, it stood in the shoes of the bankrupt to the extent it was obligated to pay these claims. The surety's obligation was supported by a consideration, and, in many instances, as in this case, security is required of a principal in addition to the premium exacted. Toward the class of creditors covered by the bond, the bankrupt and

the surety stood shoulder to shoulder. The surety is charged with knowledge of the law as declared by this Court.

It is to be noted that the petition for writ of certiorari is not accompanied by the usual certificate of counsel that in his opinion it is meritorious and not interposed for delay.

Conclusion.

Wherefore, it is respectfully submitted that there is no basis for the granting of the writ of certiorari, and that this Honorable Court should refuse to review the decision of the United States Circuit Court of Appeals for the Ninth Circuit.

July, 1945.

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IN THE

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RESPONDENT'S BRIEF.

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Respondent.

RESPONDENT'S BRIEF.

I.

A Surety Who Has Undertaken to Pay a Class of Creditors of a Bankrupt, as Principal, Cannot Share in the Assets of the Bankrupt's Estate by Reason of Any Payment to Some of the Creditors, Until All Claims of the Creditors of That Particular Class Have Been Satisfied in Full.

The petitioner is apparently willing to admit that the basic law as stated herein is true (see Opening Brief of Petitioner, pages 17 and 18). The law stated above is

fundamental,[1] and has been enforced under a variety of circumstances.[2]

The petitioner, while admitting the basic law of suretyship involved, attempts to limit rule to exclude its application to the instant facts, but the authorities relied upon by petitioner fail to justify such exclusion.

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[1]The leading text book on Bankruptcy, Collier on Bankruptcy, 14th ed., Vol. 3 at page 291, states the problem and the answer as follows:

"A merely partial discharge of the principal debt by the surety, be it prior or subsequent to the date of the filing of the petition in bankruptcy, falls squarely under Sec. 57i. This section provides that the surety or other secondary debtor 'shall be subrogated to that extent to the rights of the creditor.' Taken at their face value these words would seem to indicate that the creditor who proved his claim on which the surety made a part payment must share his dividends with the surety. Thus if the claim originally amounted to $1,000 and the surety paid $750 thereon, Sec. 57i conveys the impression that whatever dividends are paid on the $1,000 claim are to be divided between creditor and surety, one-quarter going to the creditor and three-quarters to the surety. The law, however, is otherwise. It allows the original creditor to continue collecting dividends on the *entire* amount of the claim ($1,000 in the previous illustration), until the aggregate of the surety's part payment and the dividends amounts to one hundred per cent of the claim. Then only may the surety assert his right to further dividends based on that part of the original claim to which he was subrogated ($750). Whatever the creditor receives in excess of the principal and interest remaining due him is held by him in trust for the surety. In this respect there is no difference between a surety who is secondarily liable for the full amount of the principal debt and one who limited his liability to a certain maximum (smaller than the principal debt) which he paid in full. Both have to wait until the principal creditor is fully satisfied.

[2]See cases such as *Prudence Realization Corp. v. Geist* (1942), 316 U. S. 89; *American Surety Co. of New York v. Westinghouse Electric Mfg. Co.* (1935), 296 U. S. 133; *Jenkins v. National Surety Co.*, 277 U. S. 258, 267; *United States v. National Surety Co.* (1920), 254 U. S. 73; *Mississippi v. First National Bank of Greenwood* (1933), (C. C. A. 5th), 66 Fed. (2d) 9, 13; *Matter of Hanson & Tyler Auto Co.* (1922), (D. C. N. D. Iowa), 286 Fed. 161; *Matter of Manhattan Brush Mfg. Co.* (1913) (S. D. N. Y.), 209 Fed. 997; *Westinghouse etc. Co. v. Fidelity & Deposit Co. of Md.* (1925), 251 Mass. 418.

The case of *Moise v. Scheibel* (1917 C. C. A. 8th) 245 Fed. 546, is cited (Pet. Op. Br. p. 19) to sustain the contention that the bankruptcy court cannot divert dividends payable from one creditor to another creditor so as to create a lien. However, the quotation taken from this case does not reveal that it involved the attempt of a Referee to give to one creditor the dividend of another merely because the other had promised orally that his indebtedness would be paid. No contract such as is involved in the instant case appears in *Moise v. Scheibel.*[3]

The case of *American Surety Co. v. Bethlehem Bank,* (1941), 314 U. S. 314, cited by petitioner (Pet. Op. Br. p. 19) does not involve any facts analogous or similar to the facts in the case at bar. In the cited case the State of Pennsylvania deposited $135,000 with the bankrupt and obtained a $125,000 surety bond plus a pledge of $12,000 in negotiable bonds. From the bonds, plus dividends from the bankrupt estate, the State collected $66,500, and the surety company paid off the balance owing to the state of $68,500. In the bankruptcy it was attempted to limit the payment of dividends to the surety company to the $68,500 which it had actually paid out, but the Supreme Court held that the surety company was entitled to a

---

[3]In *Moise v. Scheibel, supra,* the entire discussion on the question of liens is contained in the following language at page 547:

"We, however, think that the court erred in granting a preference to the claim of the Auto Top Company over that of Moise. They were creditors of the same class, and the evidence does not warrant the establishment of what practically amounts to a lien on the dividends payable to Moise, in favor of the Auto Top Company. The evidence tends to show that Moise promised orally that the indebtedness of the Auto Top Company should be paid; but there is no evidence of facts which would create an estoppel on the part of Moise from receiving his dividends on an equality with the Auto Top Company."

percentage based on the $135,000. The dissenting opinion of Justice Douglas, in which Justice Black concurred, contains an interesting discussion of the rights of a surety, and points out that equitable considerations will frequently bar the surety or reduce his rights.[4]

A reading of petitioner's discussion of the *American Surety Co. v. Electric Co.*, (1935), 296 U. S. 133, *supra* (Pet. Op. Br. p. 19), might tend to give the impression that the Court, in deciding that case, might have indicated limitations concerning the effectiveness of the law governing suretyship, but this is not true. As far as the facts are concerned, they are analogous to the instant case in that the surety company wrote a bond providing that the contractor would "promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work." (*American Surety Co. v. Electric Co., supra*, at p. 135.) The contractor finished his work but did not make full payment to the persons

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[4]In *American Surety Company of New York v. Bethlehem, supra*, in his dissenting opinion (page 323) Justice Douglas states: "It is ordinarily true that a surety succeeds to all of the rights and remedies of the creditor, including the latter's priority. *Litterdale's Executors v. Executor of Robinson*, 12 Wheat. 594. But that is no inexorable rule. As this court stated in *Memphis & Little Rock R. v. Dow*, 120 U. S. 287, 301-302, 'The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice.' In determining whether it would be fair or equitable to allow the subrogation to the full extent of the creditor's rights and remedies, consideration will, of course, be given to the prejudice, if any, suffered by other creditors. But the mere fact that the other creditors will not be worse off than if the surety's principal had pressed the claim is not the sole solvent of the problem. We are not dealing with a mechanical rule. The question remains whether justice requires, or policy permits, the surety to succeed to his principal's privileged position.' Such considerations frequently are a barrier to any subrogation; at other times they may cut down the rights of the surety and give him less than his principal could exact. . . ."

supplying him with labor and materials. Subsequently the contractor became bankrupt, and his trustee in bankruptcy took over. The total amount of the surety bond was $3,940. In the instant case on review before this Court the total amount of the bond was $33,950 [R. p. 87]. The moneys in the hands of the trustee included, in the cited case, the balance of the funds paid by the government, for whom the contract had been performed, amounting to $2,724.23. The surety company paid the total amount of its bond, $3,940, and in the bankruptcy attempted to assert an equal right to dividends as against the materialmen, who had supplied the bankrupt contractor with labor and materials. In the cited case, the surety had paid out the total amount of its bond. In the instant case the surety company had paid out only $6,987.48 of the amount of its $33,950 bond [R. p. 86]. In the cited case, although the total amount of its bond had been paid, nevertheless the Court held that the surety could not participate in any dividend until the materialmen had been paid in full. Surely the surety company was in a better position to complain of harshness or inequity. There, it had paid out the maximum of its possible liability. Here, the loss could have amounted to many times the amount it actually paid. The true applicability of the *American Surety Co. v. Electric Co.* case, *supra*, is obvious when we consider the following language of the Court at page 138:

> ". . . Insolvency supervening, the surety must be postponed in the distribution of the assets to the

remedies of any claimants who are members of the class of creditors covered by the bond."

How could creditors in excess of the amount of the bond, to-wit, $3,940, in that case, be "effectively secured" (Pet. Op. Br. p. 19) unless the rule of law laid down by the Court applies to the same "class of creditors" that the courts below protected as against the claims of this petitioner?

To further explore the inapplicability of the argument of petitioner, let us assume that prior to the bankruptcy the creditors involved in the instant case had filed a claim of lien within the time allowed by law, or had notified the surety and had actually reduced their claims to judgment. If the bond of the surety amounted only to $6,987.48, and this amount had been paid out by the surety, it would then appear that the rule laid down by the case of *American Surety Co. v. Electric Co., supra,* would still bar it from participation until the unpaid creditors had been paid. Nevertheless, as far as the amount of the surety bond would be concerned, the creditors would not have been effectively secured. Obviously, the basic fallacy in the reasoning of the petitioner lies in the fact that it fails to recognize that as soon as labor and materials are delivered to a particular construction job, *the materialmen involved have moneys owing to them and become the class of creditors for whose protection the bond or undertaking was written.*

II.

By Subordinating the Payment of Dividends on the Claim of Petitioner to the Payment of the Claims of the Class of Creditors Covered by Petitioners Bond, the Federal Court Gave Due Recognition to the Applicability of State Statutes.

A search of the records indicates that California is probably the only state which has specifically provided protection for persons in the category of the materialmen, etc., covered by petitioner's bond, by making such provision an actual part of its Constitution. Article XX, Section 15, of the Constitution of the State of California, adopted in 1879, is as follows:

> "Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the legislature shall provide by law, for the speedy and efficient enforcement of such liens."

We note with interest the apparent inconsistency appearing from the citations by the petitioner, particularly on pages 10 and 11 of its opening brief (footnotes 3 and 4). Under note 3, alleged to be a fair summary of the California case law, it is stated that mechanics' liens are entirely of statutory creation and that before a valid lien may arise the claimant must have complied with the statute, citing in support thereof 17 Cal. Jur. Sec. 50 (Mechanics' Liens). This statement of purported law is obviously erroneous, in view of the fact that the right of lien arises from the Constitution itself, and this latter conception of the law is then adopted at 17 Cal. Jur. on Mechanics' Liens, Section 68, strictly contrary to the purport

of the quotation from Sec. 50. (See footnote 4, Pet. Op. Br. p. 11).

In other words, construction of the bond in the instant case, if it is to be construed in connection with the laws governing it, as contended by petitioner, must not only take into consideration the provisions of the Code of Civil Procedure, which merely reflects the remedy given materialmen, but must likewise include therein full recognition of the Constitutional rights granted citizens of the State of California.

> ". . . Liens of mechanics and materialmen are protected by section 15, article XX, of the state constitution, and, being remedial in character, are to be liberally construed with a view to effect the object of the constitution and promote justice."[5]

Petitioner has made the bald assertion in its brief that unless all steps have been complied with as required by the Code of Civil Procedure, prior to bankruptcy, the bankruptcy Court cannot recognize a materialman as secured by an undertaking written for his protection. Although it is the contention of respondent that this problem does not exist in the instant case on review, because the taking of remedial steps has to do primarily with the owner of the property and not with the surety contractor and his surety, nevertheless, cases such as *Cutler-Hammer, Inc., v. Wayne* (1939), (C. C. A. 5th) 101 F. (2d) 823, point out the fallacy of the contention of petitioner.

A rather novel argument is presented by petitioner at page 8 of its brief, wherein it is asserted that the bond

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[5]*Hammond Lumber Co. v. Barth Invest. Corp.* (1927), 202 Cal. 601, at 605.

of the surety is a substitution of liability for the owner of the property and not for the contractor. No cases are cited to support this contention, and it would not appear that any logically reasoning Court could sustain such a view, after considering the pertinent facts.

In the first instance, it is always of assistance to look to the documents in question in order to ascertain the intention of the parties. The application for the bond in the present case describes the bankrupt, who was the contractor, as the "Indemnitor" and includes the following language:

> "IV. That the suretyship is for *the special benefit of the Indemnitor* (italics ours) and the Indemnitor's property now owned or hereafter acquired and the income and earnings thereof, from all of which the Surety shall be entitled to indemnity; and the Indemnitor represents that it is specially and beneficially interested in the award or contract, the continuance thereof and in the suretyship." [R. p. 64.]

The bond itself refers to the bankrupt as the principal, and contains no language for the direct protection of the General Electric Company (either the owner or lessee of the real property upon which construction was erected) [R. pp. 86, 87, 88]. It is obvious from the terms of the application and the bond itself that the purpose of the bond was to make certain that the contractor would pay the claims in full of all persons performing labor or furnishing materials to the job. The only effect at law that the filing of this bond had was that it limited the obligation of the owner of the property to the payment of the total contract price rather than the payment of all claims including those upon contracts which he had not created. It was the contractor who paid the surety com-

pany its premium, and who likewise furnished the collateral which was obtained by the surety company in connection with the writing of the bond. There was no direct relationship between the surety company and the owner or lessee of the property.

The true issue in the instant case is whether or not the federal courts below correctly enforced the terms of the bond filed by petitioner in connection with the applicable laws of the State of California. Nothing in the cases cited by petitioner, or in its argument (Point No. 2, commencing on page 15 of its opening brief) justifies any reconsideration of the ruling of the courts below.

In the case cited (Pet. Op. Br. p. 16) by petitioner of *Security Mortgage Company v. Powers* (1928), 278 U. S. 149, we find at page 154 recognition of the rights and application of the bankruptcy law as follows:

> ". . . The construction of the contract for attorney's fees presents, likewise, a question of local law. See *Farmers Bank v. Fed. Reserve Bank*, 262 U. S. 649, 660. Whether the liability is, under the circumstances, enforceable against the proceeds of the sale, raises federal questions peculiar to the law of bankruptcy . . ."

Of a similar tenor is the case of *Board of Trade of City of Chicago v. Johnson* (1923), 264 U. S. 1.[6] (Pet. Op. Br. p. 16.)

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[6]In *Board of Trade of the City of Chicago v. Johnson*, *supra*, at page 10, the following language is found: "Congress derives its power to enact a bankrupt law from the Federal Constitution, and the construction of it is a federal question. Of course, where the bankrupt law deals with property rights which are regulated by the state law, the federal courts in bankruptcy will follow the state courts; but when the language of Congress indicates a policy requiring a broader construction of the statute than the state decisions would give it, federal courts cannot be concluded by them. *Board of Trade v. Weston*, 243 Fed. 332."

The case of *Malott & Peterson v. Street* (1925) (C. C. A. 9th) 4 F. (2d) 770 (cited at page 17 of petitioner's brief), reflects no inconsistency in the decisions of the 9th Circuit Court of Appeals, because in the *Malott* case there was no problem of suretyship involved. The Circuit Court found that the claimant had not attempted to enforce any lien rights, but had sued merely for moneys owing to it and had levied judgment and obtained payment within four months preceding bankruptcy of a sub-contractor defendant, and thereby the moneys obtained on the judgment were set aside as a voidable preference.

The general attitude of the California courts with reference to the limitation of the rights of a surety are recognized in many cases, and is actually but a reflection of the general law applicable to sureties.[7]

Under the Constitution of the State of California, Article XX, Section 15, the creditors favored in the instant case by the ruling of the courts below, became entitled to and had a lien upon the property improved by their efforts and materials. The bond in question specifically provides that it is written to protect any and all persons furnishing materials or work or on the premises

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[7]See *Meyers v. Bank of America* (1938), 11 Cal. (2d) 92, at page 97, as follows: ". . . Otherwise stated, where by the application of equitable principles, a surety has been found not to be entitled to subrogation, an assignment will not confer upon him the right to be so substituted in an action at law upon the assignment. His rights must be measured by the application of equitable principles in the first instance, his recovery being dependable upon a right in equity, and not by virtue of an asserted legal right under an assignment. . . ."

in question. The language of the bond itself defeats petitioner's argument.

> "Now Therefore, if the above bounden Principal shall pay or cause to be paid in full the claims of all persons performing labor upon or furnishing materials to be used in doing the work described in said contract or in any modification thereof, then this obligation shall be void; otherwise to remain in full force and effect." [R. p. 87.]

The class of creditors for whom the bond was created, therefore, is all persons performing labor upon, or furnishing materials to be used in doing the work described in the contract. No contention is made by petitioner that the creditors do not fall in this class. The time within which suit could have been filed against the bankrupt contractor had not lapsed when bankruptcy intervened, and therefore timely filing of claims in the bankruptcy proceedings by the three creditors involved was all the law required them to do. The taking of any statutory steps to enforce a mechanic's lien is a condition which merely affects the enforcement of the rights of the creditor against the property involved. Rights which are granted to a creditor by the express provisions of the Constitution of the State of California, and cannot be construed in any other light than that used in construing cases enforcing statutes of limitations, which likewise do not go to the merits of a claim, but merely affect the enforcement of certain remedies.

Once the class of creditors as creditors is established, analyzing the bond in question can lead to no other con-

clusion than that the surety is subordinated to the payment of the claims of such creditors when bankruptcy intervenes. There is no revival of an expired remedy, as petitioner argues, without complying with state law. There is only the enforcement of a fundamental constitutional right as against a surety who has expressly assumed an obligation.

Petitioner would have the Court believe that the creditors of the bankrupt are being given unwarranted protection. A surety was hired by the bankrupt and the surety exacted the premium and collateral which it felt was necessary to protect itself against the acts of the bankrupt and the possibility of his going into bankruptcy. The bankrupt was the contractor and principal with whom the surety dealt — not a stranger to the transaction, such as the owner or lessee of the property. The surety could have been liable for a much larger amount, but is not satisfied with the limitation of its liability, as shown by its general claim. No, the surety seeks to obtain money from the estate of the bankrupt contractor on a parity with and to the detriment of unpaid creditors of the class for whose protection the surety wrote its bond. The Court will note that the creditors who are protected by the ruling of the referee, below, are only those creditors who came within the class covered by the bond. Towards this class of creditors the bankrupt and the surety stand shoulder to shoulder, and the surety is not entitled to participate in any dividend until the terms of its undertaking have been fully performed by payment, either from the estate of the contractor or from the surety.[8]

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[8] *American Surety Co. of New York v. Westinghouse Electric Mfg. Co.* (1935), 296 U. S. 133.

Conclusion.

An analysis of the arguments presented by both the petitioner and by the respondent should indicate clearly that there is no question of the Circuit Court of Appeals having failed to enforce and recognize State law. Actually, the only issue involved arises as part of the routine administration of a bankruptcy estate, and was correctly resolved by the decisions of the lower federal tribunals.

Wherefore respondent prays that the judgment be affirmed, with costs to the respondent.

Respectfully submitted,

THOMAS S. TOBIN,
Counsel for Respondent.

Of Counsel:
MARTIN GENDEL,

Los Angeles, California.
January, 1946.

SUPREME COURT OF THE UNITED STATES.

No. 142.—October Term, 1945.

American Surety Company of New York, Petitioner, *vs.* Paul W. Sampsell, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 25, 1946.]

Mr. Justice Black delivered the opinion of the Court.

This case raises questions concerning the equitable power of a federal bankruptcy court to subordinate claims of some creditors to those of others. The creditors are a surety entitled to subrogation for payments upon its surety bond and laborers and materialmen for whose benefit the bond was executed.

Stratton, now in bankruptcy, made certain alterations in factory buildings located in California. In connection with this project Stratton as principal, and the petitioner, American Surety Company of New York, as surety, executed a joint statutory bond for $39,500, by which they bound themselves to pay all persons furnishing materials for, or performing work on, the job. The bond strictly conformed in all respects with requirements of the California law governing laborers' and materialmen's liens and was filed and recorded as provided by Section 1183 of the California Code of Civil Procedure. Parts of the bond's language incorporated portions of Sections 1183 and 1187 of the California Code of Civil Procedure which provide that "no action" on a recorded bond may be maintained unless within a specified statutory period a mechanics lien claim shall have been filed or the surety shall have been given notice of the unpaid claim.

Because of financial difficulties Stratton was unable to pay all the laborers and materialmen. Some of them, with claims aggregating $6,724.78, filed lien claims and gave notice within the statutory period and the surety paid their claims in full. Others failed to file claims or give the required notice and the surety did not pay them.

Stratton was later adjudged a bankrupt. The petitioner surety company filed a claim for the money it had been compelled to

expend in payment of the materialmen and laborers who had given the statutory notice. Its claim rested on an agreement by Strattor to indemnify it and on the equitable doctrine of subrogation. Three of the materialmen and laborers who had failed to give notice also filed claims totalling $1,336.11 owed them for materials furnished and work performed. The referee allowed all of these claims including that of the surety company as general claims in bankruptcy. Upon motion of the respondent trustee, the referee subordinated the petitioner's claim to that of the unpaid laborers and materialmen, holding that " . . . as long as there are creditors of the class for whose benefit the original surety bond was written . . . the surety company cannot participate in dividends from the estate until these creditors have been paid in full." Thus under the order the three unpaid laborers and materialmen were to receive in addition to dividends on their own claims a pro-rata share of dividends otherwise due the petitioner until they had been paid in full or the petitioner's dividend had been exhausted. The District Court sustained the referee's order, 53 F. Supp. 131 and the Circuit Court of Appeals affirmed, 148 F. 2d 986. We granted certiorari because of petitioner's contention that the order subordinating its claims failed to take into consideration contractual rights of the surety under state law.

Petitioner argues that because the state statute incorporated into the bond requires laborers and materialmen either to file a lien claim or notify the surety within a specified period after completion of the job, the referee erred in subordinating the surety's claim to those of the laborers and materialmen who had not complied with the statutory notice provision. The rights of those creditors, it is argued, had never, under California law, been more than inchoate, and even as such had been completely extinguished prior to the bankruptcy proceedings because of a failure to give the statutory notice. Consequently, the petitioner urges, these claims ought not to be preferred in a federal bankruptcy proceeding. We think this contention is without merit and that the order of the referee was correct.

We recently had occasion to reiterate that federal bankruptcy law, not state law, governs the distribution of a bankrupt's assets to his creditors. *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 95. See also *Pepper* v. *Litton*, 308 U. S. 295, 303-306; *Pru-*

dence Realization Corp. v. *Ferris*, 323 U. S. 650, 653. True, we stated in both *Prudence* opinions that the federal law governing distribution of a bankrupt's estate should be applied with "appropriate regard for rights acquired under rules of state law". But the extent to which state law is to be so considered is in the last analysis a matter of federal law. Here the referee's subordination of the surety company's claim did not only follow the well-established rule under federal bankruptcy law, but also achieved a result in complete harmony with California's aim expressed by both its Constitution[1] and statutes, of providing materialmen's and workers' claims with extraordinary security.

The established federal rule of distribution in a situation such as the one before us was clearly set forth in *American Surety Co.* v. *Westinghouse Electric Manufacturing Co.*, 296 U. S. 133. In that case the surety company had paid out to various creditors the full amount of the statutory surety bond and filed a claim in the bankruptcy proceeding based on those payments. The surety company argued that since its full liability had been extinguished, it should be permitted to share ratably with all the bankrupt's general creditors. That contention was rejected. The Court pointed out that while liability of the surety company had ended, controlling equitable principles forbade the surety from sharing the bankrupt's assets on equal terms with any creditors who were members of the class its bond had been given to protect. The rule stated by the Court was that where insolvency supervenes, a surety's claim is postponed until payments in full are made to all "claimants who are members of the class of creditors covered by the bond".

The petitioner attempts to distinguish this case by arguing that the materialmen and workers to whose claims its claim has been subordinated were not "covered by the bond". This contention rests on the claim that according to the construction of the applicable state statutes by the California courts the bond does not protect materialmen and workers who, as the ones here involved,

[1] Article XX, Section 15, of the Constitution of the State of California is as follows:

"Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished and the legislature shall provide by law, for the speedy and efficient enforcement of such liens."

have not complied with statutory filing and notice provisions. While this claim as to California law is denied by the respondent we need not resolve the dispute. For even if petitioner's claim as to California law is correct, the creditors in the *Westinghouse* case were certainly no more protected by that bond after the surety had paid out the full amount, than the materialmen and laborers are said to be protected here after the time for notifying the surety had expired. The phrase "covered by the bond" as used in the *Westinghouse* case did not have the meaning petitioner ascribes to it but had reference rather to the class of creditors for whose benefit the statutory bond was executed. All materialmen and laborers who contributed to Stratton's job clearly come within that class. The basic reason for the rule announced in the *Westinghouse* case applies with equal force here. The bond was intended to protect materialmen and laborers who worked on the job so that they would not have to bear the risk of Stratton's insolvency. But for his insolvency and bankruptcy these laborers and materialmen would have been able to recover from him the money due them, no matter what their rights against the surety might have been. Consequently the surety should not by claiming under subrogation or indemnity for money paid to some of the creditors for whose benefit the bond was intended, be allowed to reduce the share of the bankrupt's assets due to other creditors whom the bond also was intended to protect from insolvency. For this would tend to defeat the very purpose for which the bond was given and therefore cannot be permitted under the equitable principles governing distribution of a bankrupt's assets. *Prudence Realization Corp.* v. *Geist*, *supra*, at p. 96.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.